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GENERAL THEORY OF MISTAKE IN THE FORMATION OF CONTRACT

I. INTRODUCTION

BOTH the object and the scope of this article are strictly limited. Its object is to restate, in the light of the leading English authorities, the principles governing operative mistake and to clarify their application for the benefit of students. Its scope is limited to mistake in the formation of contract, in so far as its effect is to prevent any contract from ever coming into existence. The justification for adding further to the voluminous literature on this vexed subject is that students are perplexed by its refined distinctions, by the amount of controversy to which it has given rise, by divergencies in terminology, and by a singular failure to extract from the cases clear basic principles, applicable to all circumstances. The student has been further confused by a cleavage between those applying subjective tests (seeking evidence of what the parties really intended) and those applying objective tests—seeking what reasonable men would understand as intended from the words or conduct of the parties. The correct view would appear that of a middle school of thought, recognising both kinds of test as relevant, but failing to define with precision their respective spheres of operation.

I must apologise to the many learned writers on this intricate subject if this restatement does but scant justice to their wealth of erudition and controversial argument, and trust that they will deem the interests of the harassed student a sufficient excuse.

The phenomena of contract have their parallel in other branches of our law. Students are familiar with the analysis of crime into an ' actus reus ' and a ' mens rea '; or of possession into ' corpus ' and ' animus '. This combination of act and intention is reflected in contract by the physical acts, *i.e.*, ' dealing ', and by the consent or assent of each party to the same proposition.

This ' dealing ' is further analysed, for the sake of convenience,[1] into an offer and an acceptance, and to these the objective test is applicable. Students are familiar with ' reasonable notice ' of the terms of an offer, *e.g.*, in the ' ticket cases '.[2]

[1] That offer and acceptance are but the machinery of agreement is seen from ' *The Satanita* ' *Clarke* v. *Earl of Dunraven*, [1897] A.C. 59.

[2] See ' Acceptance of offer with conditions annexed by reference ' by Sir F. Pollock, 50 L.Q.R. 29.

Further, a party cannot validly accept an offer which he knows the offeror does not intend, whether this be due to revocation as in *Dickinson* v. *Dodds*[3] or to mistake as in *Hartog* v. *Colin & Shields*,[4] where Singleton, J., inferred knowledge that the defendant was mistaken in his offer of 30,000 Argentine hair skins at so much 'per pound' (instead of 'per piece') from previous communications between the parties and the fact that this would represent but a third of their normal value. This same principle, it is respectfully submitted, explains the direction to the jury on which Hannen and Blackburn, JJ., sent back *Smith* v. *Hughes*[5] for a new trial. It is important to note that the contract sued on in that case was for the price of oats at 34s. a bushel (not 35s. a bushel, the price at which Smith originally offered them). Hughes took away the sample, and by himself offering 34s. a bushel he impliedly rejected Smith's offer and substituted his own.[6] Smith accepted this by supplying the parcel of oats. This analysis of the facts reverses the roles of the parties as erroneously indicated in many textbooks. If Smith knew that Hughes offered 34s. a bushel in the mistaken belief that Smith was selling on the terms that the oats were 'old', clearly Smith could not validly accept such offer with knowledge that he was not warranting their age. This explains the insistence by both judges on Smith's knowledge of Hughes' error, as this would preclude his acceptance. Thus the 'deal' was incomplete, and not even an ostensible *de facto* contract ever came into existence.[7] That *Smith* v. *Hughes* is the leading case on the inoperative character of error as to qualities (in contrast to substance) has obscured the fact that the new direction to the jury involved offer and acceptance rather than subjective consent. As Lord Wright emphasised in *Norwich Union Fire Insurance* v. *Price*,[8] 'It is true that in general the test of intention in the formation of contract and the transfer of property is objective; that is, intention is to be ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention'. This latter qualification[9] points the fundamental distinction between proof that no valid offer and acceptance has created a *de facto* contract, and proof that the 'deal' so established is nevertheless void for want of the intent necessary to its validity.

[3] (1876), 2 Ch.D. 463.
[4] [1939] 3 All E.R. 566.
[5] (1871), L.R. 6 Q.B. 597. If the acceptor be unaware of such mistake, then ostensible consensus is objectively established and a valid contract arises, as in *Upton-on-Severn R.D.C.* v. *Powell*, [1942] 1 All E.R. 220 (C.A.).
[6] See *Hyde* v. *Wrench* (1840), 3 Beav. 334.
[7] Cf. *London Holeproof Hosiery Co.* v. *Padmore* (1928), 44 T.L.R. 499, one *ratio decidendi* of which was that the transaction was void as the defendant knew that the plaintiff exercised his option of purchase of the site in the mistaken belief that the defendant was contracting to re-erect thereon a factory with his fire insurance indemnity.
[8] [1934] A.C. at p. 463.
[9] Omitted at p. 142 of Cheshire and Fifoot's *Contracts*.

This latter subjective test is clearly established as the basic principle throughout the English authorities.[10] Thus the definition of 'unilateral mistake' in Cheshire and Fifoot, p. 145, 'that one only of the parties to a contract is mistaken but that the other is aware, or ought reasonably to have been aware, of the mistake' is applicable to offer and acceptance, but superfluous to the affirmative proof that a party's intent did not accompany his act, *i.e.*, the 'deal': see *Boulton* v. *Jones*, *infra*.

The absence of intention is only fatal when it relates to one of the three fundamental elements of contract:—

1. The other party;
2. The subject-matter;
3. The nature of the transaction.

Its application to (1) is indicated in the contrast between mistake as to the identity of the person and mistake merely as to his attributes; to (2) between mistake as to the substance of the subject-matter and mistake as to its qualities; to (3) between mistake as to the nature of the transaction, *i.e.*, of the contract itself, and mistake as to its terms. Though the variation of terminology in each case has obscured the uniform application of the basic principle, the criterion remains constant, *i.e.*, is affirmative proof available that a party's intention has been wholly divorced from his act in respect of any of these fundamental factors? If so, the contract is void; if not, the contract is at most voidable.

The paramount importance of preserving the stability of contractual relations embodied in the maxim *pacta sunt servanda*, renders essential this limited recognition of the sphere of operative mistake in the formation of contract.

II. MISTAKE AS TO THE IDENTITY OF THE OTHER PARTY

The stability of contract would be gravely impaired were the subjective test of mistake readily accepted. Hence English law is only satisfied by affirmative proof of an intent to deal with a different person from the one actually dealt with. 'Identity' is a practical fact, not a philosophical concept for legal purposes.[11] Consideration of the importance of attributes may be relevant in determining whether a party can satisfy the onus of proof. Thus in *Boulton* v.

[10] Cf. subjective tests in fraud or undue influence. No doubt many cases exist where the decision might have been rested on invalidity of acceptance, but where the court decided on the absence of a party's intent, *e.g.*, *Hardman* v. *Booth*, *infra*, where it might have been held that Edward Gandell could not validly accept an offer which he knew to be intended for Thomas Gandell.

[11] See Dr. Glanville Williams' suggestion in 23 Canadian Bar Review at 276 that a man's identity is no more than the sum of his attributes. It is respectfully submitted, however, that his subsequent discussion of 'composite persons', made up of the attributes of two or more, bears its own refutation. Such phenomena fall outside the ken of 'the reasonable man' in contrast to the academic theorist. His ingenious problems are of practical proof rather than of substantive principle.

Jones,[12] though Boulton reasonably believed that Jones' offer was addressed to Brocklehurst merely as the casual owner of the business (sold to Boulton on the day previous), Jones could prove by his set-off against Brocklehurst that he intended him personally, and three out of the four judges relied on the set-off as evidence of intention, according to the *Law Journal* report.[13]

The affirmative proof must be of the mistake of one person's identity for that of another. Thus in *Cundy* v. *Lindsay* [14] the respondent proved that he intended Blenkiron & Co. and not Blenkarn (with whom he dealt). 'Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time, rested upon him, as between him and them there was no consensus of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required.'[15]

With this should be contrasted *King's Norton Metal Co.* v. *Edridge Merrett & Co.*,[16] where the appellant believed he was contracting with a partner in the firm of Hallam & Co., which in fact did not exist. As the offer must have come from a living person, the Court of Appeal held that he must have intended the swindler Wallis, who ordered the goods in the name of Hallam & Co. and to whom they were in fact sent. Thus the appellants were mistaken as to the attributes of Wallis, fraudulently misrepresented on the notepaper, but both intended him and dealt with him.[17] As A. L. Smith said, at p. 99, 'There was only one entity, trading it might be under an alias, and there was a contract by which the property passed to him'.

Again in *Hardman* v. *Booth*,[18] Hardman satisfied the court that he intended to sell goods to Thomas Gandell, partner in the firm, whereas the fraud of the unauthorised clerk, Edward Gandell, induced Hardman to deal with him. As he intended Thomas and dealt with Edward, the transaction was void *ab initio*. Lord Sumner observed in *Lake* v. *Simmons*,[19] 'It is the jeweller's state of mind that matters on the issue "consent or no consent", while

[12] (1857), 27 L.J.Ex. 117.

[13] It does not appear that Boulton realised the mistake, as suggested by Cheshire and Fifoot, p. 152, still less was this the *ratio decidendi*; nor was the decision rested on the objective test that an offer, addressed to Brocklehurst, could not be accepted by Boulton, as Prof. Goodhart maintains, 57 L.Q.R. at 233; nor was there any ground for estopping Jones from proving his error, as Dr. Glanville Williams argues in 23 Canadian Bar Review at 383—in addressing Brocklehurst, Jones made no misrepresentation, though Boulton might reasonably suppose the offer to be impersonal in the circumstances.

[14] (1878), 3 App.Cas. 459.

[15] *Per* Lord Cairns at 465.

[16] (1897), 14 T.L.R. 98.

[17] But for the untimely intervention of the respondent, this transaction would have been voidable for fraud.

[18] (1863), 1 H. & C. 803. Cf. *Baillie's Case*, [1898] 1 Ch. 110, where agent induced the mistake of one company for another.

[19] [1927] A.C. at 510.

the thief's state of mind and not the jeweller's is relevant to loss by theft or dishonesty '.

This somewhat rare case of mistaken identity where the transaction takes place *inter praesentes* [20] has an apt contrast in *Phillips* v. *Brooks* [21] where, on evidence that Phillips had negotiated for half-an-hour with a casual customer for the sale of some £3,000 worth of jewellery, Horridge, J., rightly found as a fact that he intended to deal with the man before him, *i.e.*, North. North's subsequent fraudulent statement that he was Sir Geo. Bullough, a man of known credit, led to Phillips abandoning his lien for the price on a £450 ring which he allowed North to take away on credit. Had the facts been, as the headnote somewhat ambiguously suggests, that North made the misrepresentation on entering the shop, a conclusion akin to that in *Hardman* v. *Booth* would seem inevitable.[22] Once Horridge, J., found as a fact that Phillips intended North, *i.e.*, the casual customer with whom he dealt, how could a belief that he was Sir Geo. Bullough involve mistake as to his identity? For such a transaction to be void, Phillips must prove that he intended all along to deal with Sir Geo. Bullough, but that he in fact dealt with North. After characterising this as ' a careful judgment ', Lord Haldane [23] continued, ' Horridge, J., found, as a fact, that though the jeweller believed the person to whom he handed the jewel was the person he pretended to be, yet he intended to sell to the person, whoever he was, who came into the shop and paid the price, and that the misrepresentation was only as to payment '.

Pothier's celebrated dictum, ' Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract ', though appositely introduced into our law through equity cases [24] where rescission is sought, is too wide of mistake in formation, as his use of ' element ' is not restricted to ' identity ' but could be used of an attribute only determining a party's motive.[25]

Thus in *Sowler* v. *Potter* [26] Tucker, J. (as he then was), was misled into giving damages for trespass where Anne Robinson had entered on premises under a lease, fraudulently induced from Miss Sowler's agent by changing her name to Anne Potter. For whom did the agent mistake Anne Potter? He manifestly intended

[20] Considered impossible by Prof. Wade, 38 L.Q.R. at 204, and Fifoot's *English Law and its Background* at 264.
[21] [1919] 2 K.B. 243.
[22] It is curious that Dr. Glanville Williams, 23 Canadian Bar Review at 404, finds this case irreconcilable with *Hardman* v. *Booth*, and that Prof. Goodhart, 57 L.Q.R. at 240, and other writers consider it erroneous.
[23] *Lake* v. *Simmons*, [1927] A.C. at 501.
[24] *E.g.*, *per* Fry, J., in *Smith* v. *Wheatcroft*, 9 Ch.D. at 230, and *per* A. L. Smith, L.J., in *Gordon* v. *Street*, [1899] 2 Q.B. 641 at p. 647.
[25] See Prof. Goodhart's strictures, 57 L.Q.R. at 233–5.
[26] [1940] 1 K.B. 271.

the woman he dealt with, though he would not have let to her had he realised that she possessed the attribute of Anne Robinson, *i.e.*, had been convicted of keeping a disorderly house.[27] As pointed out by Lord Sumner,[28] 'The distinction between real consent, obtained by deceit, and an unreal consent, extracted by a trick, is equally applicable to civil disputes' and, however illogical,[29] it is noteworthy that its partial disappearance through section 100 of the Larceny Act, 1861, was severely criticised in *Bentley* v. *Vilmont*,[30] and the distinction somewhat hastily restored by section 24 (2) of the Sale of Goods Act, 1893.

III. MISTAKE AS TO THE SUBSTANCE OF THE SUBJECT-MATTER

To the subject-matter of the contract, the principle that the entire absence of a party's intent prevents the contract from ever coming into existence, has three applications in our law: (a) the parties may intend different objects; (b) though having the same object in mind, one or both parties may be mistaken as to its 'substance' (*i.e.*, identity); (c) the parties may be mistaken in that the object is non-existent at the time of making the contract.

Manifestly, in the nature of things, only the first of these was practicable in mistake as to the person (II *supra*), *e.g.*, whereas Lindsay intended Blenkiron & Co., Blenkarn intended himself. The other party can neither mistake his own identity nor contract if he be non-existent!

(a) *The Parties intend different objects*

This is logically a case of ambiguity in expressing offer and acceptance, but as it results in each party intending a different subject-matter, hence an entire absence of *consensus ad idem*, it has been treated as mistake on the authority of the leading case of *Raffles* v. *Wichelhaus*[31] where the sale of a cargo of cotton 'ex *Peerless* from Bombay' was held void as two ships of that name were sailing from Bombay. Whereas the plaintiff intended that in December, the defendant intended that in October.

(b) *The parties are mistaken as to the substance of the subject-matter*

Though having the same object in mind, if the parties differ as to its substance (*i.e.*, identity), the contract is again void. The analysis

[27] McCardie, J., employed the same fallacious reasoning in *Said* v. *Butt*, [1920] 3 K.B. 497, but it was there *obiter* as it was irrelevant. In defending Sir Alfred Butt against the tort of knowingly inducing a breach of contract between Said and the theatre, it mattered not whether such contract were void or voidable. Contrast *Dyster* v. *Randall*, [1926] Ch. 932.

[28] *Lake* v. *Simmons*, [1927] A.C. at 509.

[29] See 'The Effect of a Secret Fraudulent Intent' by C. J. Hamson, 51 L.Q.R. 653.

[30] (1887), 12 App.Cas. at 477, *per* Lord Watson.

[31] (1864), 2 H. & C. 906. Cf. *Smidt* v. *Tiden* (1874), L.R. 9 Q.B. 446, where the parties innocently referred certain bills of lading to different charterparties. Also *Henkel* v. *Pape* (1870), L.R. 6 Ex. 7.

of the distinction between this and error as to qualities presents the student with considerable difficulty. 'Description' is applied both to the substance and quality of the object. Mistake merely as to quality, even though known to the other party as in *Smith* v. *Hughes*, does not render the transaction void. Smith's knowledge that Hughes erroneously believed him to contract on the terms that the oats were old would invalidate Smith's acceptance, but knowledge that Hughes erroneously thought the oats old had no effect.[32] Nor does greatly diminished value change identity; thus the shares remained the same in *Kennedy* v. *Panama Royal Mail Co.*[33] though of much less value through failure to secure a lucrative government contract on the faith of which they were bought.

That only mistake as to identity will suffice, however vital the quality about which the parties are in error, was settled beyond doubt by *Bell* v. *Lever Bros.*,[34] where the respondent sought to recover in quasi-contract £30,000 paid to the appellant under an alleged mistake of fact. This was as to the validity of the compensation agreement under which this sum was paid in consideration of the release of the respondents by the appellant from a service contract under which he managed their West African interests. It was alleged that the compensation agreement was void as its subject-matter, the service contract, had lost its identity through breach by the appellant's failure to account for some £700 profit, made in the course of his employment by operations in a cocoa pool. Such breach was held to render the service contract 'voidable', but not to destroy its identity, hence the compensation agreement was binding and the money paid thereunder irrecoverable. As Lord Atkin explained at 218 'A mistake (*i.e.*, as to quality) will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be'; and Lord Thankerton at 233 'The mistake was not as to the existence of agreements which required termination—for such did exist—but as to the possibility of terminating them by other means'. Lord Atkin at 224 gives further examples of the inoperative character of error as to quality: the purchase of an unsound horse, believing it to be sound; of a modern copy of a picture for a high price, believing it to be an old master; of a dwelling-house which proves uninhabitable; or of a roadside garage business on a busy thoroughfare, even though the vendor knows that it is shortly to be by-passed. Though an erroneous belief, whether unilateral or bilateral, is the motive of each of these transactions, all are valid. Such may be impeached only if induced

[32] See *Carter* v. *Crick* (1859), 4 H. & N. 412.

[33] (1867), L.R. 2 Q.B. 580. No doubt, after the Judicature Act of 1873, relief by way of rescission for innocent misrepresentation would be available.

[34] [1932] A.C. 161, and see 52 L.Q.R. 27 by the present writer.

by misrepresentation giving rise to rescission, or, if they contain a warranty, remedies for breach may be invoked.

The true test of mistake as to substance is given by Lord Atkin at 227 : ' Does the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts? '

Though positive illustrations of such mistake are rare in the reports, apart from dicta, *Gompertz* v. *Bartlett*[35] affords a clear and authoritative example. The sale of an inland bill of exchange (unenforceable for want of a stamp) was held void on proof that both parties erroneously believed it to be a foreign bill. Campbell, C.J., said at 853 : ' This is not a case in which an article answering the description by which it is sold has a secret defect, but one in which the article is not of the kind which was sold. . .'. ' The case is precisely as if a bar was sold as gold, but was in fact brass, the vendor being innocent '.

Recently in *Nicholson & Venn* v. *Smith Marriott*,[35a] Hallett, J., was prepared to hold void, for mistake as to the identity of the subject-matter, the sale by auction of two small table-cloths and a dozen napkins by an executor to an antique dealer. These were embroidered with the royal arms, believed to be those of Charles I, and 750 guineas was paid. The learned judge found as a fact that the parties intended the sale and purchase, not of table linen, but of a ' Carolean relic ' (or antique), from which a Georgian antique differed in identity. This case is readily distinguishable from Lord Atkin's illustration *supra*, where both parties intend the sale and purchase of a picture, though erroneously believing it to be an old master, whereas it proves to be a modern copy. Such mistake is not as to the identity of the picture, but as to a quality, however important a quality, *viz.*, by whom it was painted.

So in *Scriven* v. *Hindley*,[36] Lawrence, J., held void the sale by auction of Russian tow on proof that the defendant intended to bid for hemp, the jury having found that they were different commodities in commerce, though the auctioneer thought the mistake was only as to the value of tow. Had he known, his acceptance would have been invalid as previously explained. With these cases may be compared *Thornton* v. *Kempster*[37] where a broker, acting for both parties, mistakenly gave wrong bought and sold notes. The sale was held void as the plaintiff intended to sell St. Petersberg Clean Hemp, which differed in substance and not merely quality from the Riga Rhine Hemp which the defendant intended to buy.

If the quality be an express term or implied as by section 14 of the Sale of Goods Act, 1893, absence of such quality may entitle

[35] (1853), 2 E. & B. 848.
[35a] (1947), 177 L.T. 189.
[36] [1913] 3 K.B. 564.
[37] (1814), 5 Taunt. 785.

the purchaser to return the goods and recover the price, but this constitutes a failure in performance, not in formation.[38]

Mistake as to quantity or price is inoperative. Thus in *Cox* v. *Prentice*[39] the sale of a silver bar was binding, though the excess paid over the price agreed through error in assaying its weight was recoverable in quasi-contract.

Moreover *Phillips* v. *Bistolli*[40] turned on whether a foreigner's mistaken bid of eighty-eight guineas for a pair of earrings, for which he proved that he intended forty-eight, vitiated his 'acceptance' within section 17 of the Statute of Frauds, 1677,[41] so as, in the absence of a written memorandum, to render the contract unenforceable in an action for the price. The case is, therefore, no authority for the proposition that no contract came into existence, as is suggested in successive editions of *Benjamin on Sale*, and by other writers relying on his misreading of this case.

Some of the confusion is traceable to the importation from Bell's *Principles of Scots Law* of a five-fold classification of mistake by Lord Watson in the Scots Appeal.[42] His 3 'the price or consideration' and 4 'the quality of the thing engaged for, if expressly or tacitly essential' are only valid of systems based on Roman law unless the latter amount to a mistake as to its identity, which would then fall under his 1 'its subject-matter'.[43]

(c) *The parties are mistaken as to the existence of the subject-matter*

Although non-existence of the subject-matter at the time of making the contract might be treated under impossibility of performance, English law—unlike Roman—has elected to treat of this under mistake, *i.e.*, the object has lost its identity without any substitute remaining.

In *Couturier* v. *Hastie*[44] the appellant sold through Hastie, his *del credere* agent, a cargo of corn, which all concerned believed to be en route from Salonika to London. In fact, it had become overheated and had been disposed of at Tunis. The House of Lords held the sale therefore void and Hastie was not therefore liable on his guarantee of the purchaser's solvency. In *Strickland* v. *Turner*[45] sale of an annuity, after the death of the annuitant,

[38] Failure to distinguish breach of condition from mistake in formation in such cases as *Sullivan* v. *Constable* (1932), 48 T.L.R. 369, led Cheshire and Fifoot at 144 and Prof. Hughes, 'Consensus and Estoppel', 54 L.Q.R. 370 at 374, to import the objective test from offer and acceptance and estoppel into the subjective test by which the absence of any intent accompanying the 'deal' is affirmatively proved.

[39] (1815), 3 M. & S. 334.

[40] (1824), 2 B. & C. 511; see Benjamin on Sale, 7th ed., 118–9.

[41] Now substantially reproduced by s. 4 (3) of the Sale of Goods Act, 1893.

[42] *Stewart* v. *Kennedy* (1890), 15 App.Cas. at 121.

[43] See 'Error in Substantia', by F. H. Lawson, 52 L.Q.R. 79.

[44] (1856), 5 H.L.C. 673.

[45] (1852), 7 Ex. 208.

was held void, and the price paid recoverable as for a total failure of consideration. Again, non-existence of a marriage, the supposed subject-matter of a separation deed, rendered the latter void in *Galloway* v. *Galloway*.[46]

But the consent of the parties must be wholly destroyed. Thus the mere wrecking of a ship will not suffice. In *Barr* v. *Gibson*,[47] Parke, B., ordered a new trial as the ship had only foundered in the Pacific and might be salvaged.

Section 6 of the Sale of Goods Act, 1893, embodies the general principle where specific goods perish before the time of sale without the seller's knowledge, and this has been extended to a parcel of 700 bags of Chinese ground nuts, of which 109 had been stolen from their place of deposit, on proof that the parties regarded this subject-matter as indivisible; see Wright, J. (as he then was), in *Barrow, Lane & Ballard* v. *Phillip Phillips*.[48]

IV. MISTAKE AS TO THE NATURE OF THE TRANSACTION

AFFIRMATIVE proof of mistake in respect of the third fundamental factor in contract, *i.e.*, the juridical nature of the transaction, similarly divorces the necessary intention from the ostensible 'dealing'. No parallel to *Raffles* v. *Wichelhaus* appears in the reports, or is likely to arise in practice. Mistake as to identity or existence alone remain for consideration.

(a) *The parties may be mistaken as to the nature of the transaction*

Such errors have mostly arisen in relation to written documents, the party in error denying his signature by pleading *non est factum* or *non assumpsit* in defence. Many textbook writers suggest that if one party intend bailment and the other sale, or if one party intend a loan and the other a gift, no legal relationship will be created.

In *Carlisle & Cumberland Banking Co.* v. *Bragg*[49] the Court of Appeal held that Bragg could deny his signature to a guarantee of Rigg's overdraft at the appellants' bank on proof that Rigg fraudulently misled him into intending to witness an insurance proposal, a

[46] (1914), 30 T.L.R. 531.
[47] (1838), 3 M. & W. 390.
[48] [1929] 1 K.B. 574.
[49] [1911] 1 K.B. 489. N.B.—The jury's finding of negligence was irrelevant as no duty of care was owed by Bragg to the Bank so as to ground an estoppel. A jurisprudence that rejected any duty of care in the making of innocent misrepresentations (however inadvisedly) in *Derry* v. *Peek* (1889), 14 App.Cas. 337, could ill allow the scope to estoppel in simple contracts suggested by some writers; see *Mercantile Bank of India* v. *Central Bank of India*, [1938] A.C. 287 (where the Privy Council refused to follow its own decision in *Commonwealth Trust Co.* v. *Akotey*, [1926] A.C. 12), and *Wilson & Meeson* v. *Pickering*, [1946] K.B. 422, a most valuable review of estoppel by the Court of Appeal.

transaction of a wholly different kind. Earlier illustrations are to be found in *Foster* v. *Mackinnon*,[50] where a bill of exchange was indorsed in the belief that it was a guarantee, and *Lewis* v. *Clay*[51] where the signature to a promissory note was fraudulently obtained in the erroneous belief that a private family arrangement was being witnessed. Had negligence been proved in either of these cases the defendant would have been estopped from denying his signature by breach of the duty of care owed in respect of negotiable instruments to subsequent *bona fide* holders for value according to the custom of the law merchant.

Here again, the party must prove affirmatively that he mistook one transaction for another. Thus in *Gilman* v. *Gilman*[52] a wife could not repudiate her signature to a document, which she knew to have some business efficacy from similar previous requests to sign by her husband, though the document in question turned out to be a separation agreement, releasing him from any further claims by her. She had no answer to the question 'for what transaction did she mistake this?'

Error as to the contents of the document or terms of the transaction does not suffice to preclude formation. This corresponds to mistake as to attributes in II, *supra*, or as to qualities in III. In *Howatson* v. *Webb*,[53] Webb was fraudulently induced to execute a mortgage in the erroneous belief that he was signing a reconveyance of the property which had been vested in him as nominee and was held liable on the mortgagor's covenant to repay. So also in *Blay* v. *Pollard & Morris*[54] a verbal dissolution of partnership was embodied in a written document by Pollard's father, a solicitor. It omitted a term of the verbal agreement exonerating Morris from liability for arrears of rent. Morris signed without reading, on the assumption that this term was included. The Court of Appeal, whilst expressly approving the principle laid down by *Carlisle & Cumberland Banking Co.* v. *Bragg*, *supra*, held Morris liable for arrears as he intended this dissolution of partnership and was only mistaken as to its terms.

(b) *The parties are mistaken as to the existence of the transaction*

In *Bell* v. *Lever Bros.*,[55] Lord Atkin stated: 'Corresponding to mistake as to the existence of the subject-matter is mistake as to title in cases where, unknown to the parties, the buyer is already the owner of that which the seller purports to sell to him. The parties intended to effectuate a transfer of ownership; such a

[50] (1869), L.R. 4 C.P. 711.
[51] (1898), 67 L.J.Q.B. 224.
[52] (1946), 174 L.T. 272.
[53] [1907] 1 Ch. 1.
[54] [1930] 1 K.B. 628.
[55] [1932] A.C. at 218.

transfer is impossible; the stipulation is *naturali ratione inutilis*'. Thus in *Cooper* v. *Phibbs*,[56] Lord Westbury granted rescission of a lease of a salmon fishery on proof that the lessee was a life tenant thereof, treating such mistake as to a private right as one of fact, not law. Lord Atkin's criticism is that such a transaction should have been treated as void, rather than voidable.

Were the title in a third party, the question would be one of failure in performance, as distinct from failure in formation, and the purchaser could obtain relief, *e.g.*, he could reject the goods and recover the price under section 12 of the Sale of Goods Act, 1893, or if he was no longer in possession of the goods, he could recover the price in quasi-contract as money paid for a consideration which had wholly failed.[57]

V. CONCLUSIONS

It is therefore submitted that:—

1. Like crime and possession, contract may be analysed into acts, *i.e.* 'dealing', and intent.

2. Such 'dealing' constitutes the outward manifestation of the agreement to be judged by objective standards.

3. Knowledge by one party that the other is mistaken as to the the terms of the contract is only relevant to prevent a *de facto* contract from being created by offer and acceptance.

4. Though offer and acceptance be complete, it is yet open to a party to prove affirmatively that his intent was entirely absent from such 'dealing'.

5. Such affirmative proof depends on subjective tests, and requires that a party must intend one person, substance, or transaction, and in fact deal with another, or that such substance or transaction is non-existent.

6. For no contract to come into existence through fundamental error, the mistake must be as to the identity of the other party—as opposed to his attributes; as to the substance of the subject-matter—as opposed to its qualities; or as to the nature of the transaction—as opposed to its terms.

T. H. Tylor.

[56] (1867), L.R. 2 H.L. 170. Cf. *Bingham* v. *Bingham* (1748), 1 Ves.Sen. 126.
[57] See *Rowland* v. *Divall*, [1923] 2 K.B. 500.

LEGISLATION THROUGH ADJUDICATION. THE LEGAL ASPECT OF FAIR WAGES CLAUSES AND RECOGNISED CONDITIONS

LEGAL phenomena are usually more interesting if they play havoc with textbook schemes of jurisprudential conceptions than if they allow themselves neatly to be labelled and pigeon-holed without resistance. The law of industrial relations is, like international law, still in a fluid state. It is still capable of giving rise to new forms and norms which defy any established classification. The present paper has been written with the object of drawing attention to a pattern of legislation, of great and growing importance in British labour law, which compels the lawyer and the jurist to re-examine the validity of one of his most cherished and sacrosanct distinctions: the distinction between a law-finding and a law-making agency, between a court and an organ of delegated legislation.

That judges make law in finding it—everywhere, whether they profess to be votaries of a system of 'case law' or of a 'codified' system—has become a commonplace. Interpreting the law and developing the law are two functions which cannot be kept apart in practice—who would doubt it? Yet, is there any lawyer but would expect with confidence to be able to distinguish a court from an administrative agency wielding powers of subordinate legislation? Is there any law student who could not inform us that a court, while possibly a law-making body, will never, as a court, formulate legal norms in the abstract? That it creates new law incidentally, in the process of adjudicating claims based on the existing law? That it will invariably pretend to be '*la bouche de la loi*' even where it transforms it? And can there be anything more clearly defined in the conceptual landscape of modern jurisprudence than the distinction between litigation and legislation, between a decision of a *lis* and the passing of a statute, an order, or a decree? Does not our young law student smile at the naiveté of his ancestors when he reads that, in its early days, the English Parliament made laws by way of adjudication, and that the High Court of Parliament acted in such a manner that 'no definite line . . . can be drawn . . . between an act of and an "award" of Parliament'?[1] Law-finding and law-making may be processes no longer as clearly and unambiguously distinguishable to our eyes as to those of Montesquieu, but the difference between legislative and judicial *institutions* seems to have lost nothing of its rock-like solidity. We have—so it

[1] McIlwain, *The High Court of Parliament and its Supremacy*, p. 114, and Chap. 3 passim. In a sense, the present paper is a footnote to Prof. McIlwain's book.

appears—entirely moved out of the sphere in which any organ of legislation translates into positive norms those 'fundamental' principles of natural law whose presence in the Middle Ages made the legislative act indistinguishable from a judgment.[2]

We shall see that the living law is capable of developing hybrid patterns. In the face of contemporary events in the legal world, the jurist may not be able to continue to be as determined as he used to be in his insistence on the difference between legislation and litigation.

I

In order to clear the field, it may be as well to say at the outset what this paper is not intended to discuss: It is not concerned either with the direct enforcement of collective agreements or with compulsory arbitration or with minimum wage laws.

If a system of law endows the parties to a collective labour agreement with the power of creating norms binding upon individual employers and employees, it subjects these individuals to the legislative power of the trade unions and employers' organisations who are parties to the agreement. Many countries have enacted laws which make the content of collective agreements 'enforceable' in this way. During the transition period after the First World War, a statute was in force in this country for not quite two years by which, for certain categories of workers, collective agreements were thus given 'legal' effect.[3] There are also one or two other isolated instances of collective agreements being made the 'law of the trade' either automatically or by ministerial order. All these exceptions, however, confirm the rule that voluntary collective agreements have never been directly enforceable in this country

[2] McIlwain, *l.c.*, Chap. 2, esp. pp. 50–51.

[3] Wages (Temporary Regulation) Act, 1918 (8 & 9 Geo. 5, c. 61), originally—see s. 1—in force for six months from Nov. 21, 1918, then extended for a further six months by the Wages (Temporary Regulation) Extension Act, 1919, (9 & 10 Geo. 5, c. 18), and further extended (in so far as the provisions now under consideration are concerned) until September 30, 1920, by s. 6 of the Schedule to the Industrial Courts Act, 1919 (9 & 10 Geo. 5, c. 69). Under this legislation employers were liable to pay their workmen 'not less than the prescribed rate' of wages (s. 1), and were both criminally (s. 1 (1)) and civilly (s. 5 (2)) liable if they failed to do so. The 'prescribed' rate was, by s. 4, defined in various ways for various categories of workers. For male workers, it was the 'recognised' rate, *i.e.*, the rate 'generally applicable' on November 11, 1918, which was not necessarily fixed by collective agreements, although no doubt it frequently was. What was here enforced was the custom, not the collective agreement (s. 4 (*a*)). The remark in the text applies to female workers in whose trade and district the wages were on November 11, 1918, 'subject to an agreement between employers employing a majority of women or girls engaged on that work in the trade or industry or branch thereof in the district and one or more trade unions' (s. 4 (*d*)). It was also possible to substitute for male workers an 'agreed' rate for the 'prescribed' rate, provided the Minister gave his consent (s. 1). This, and the case of the female workers under s. 4 (*d*), are among the very few examples of collective agreements being made 'law' in this country. See, for this legislation, Stoker, *The Industrial Courts Act*, London (Stevens), 1920.

either in war or in peace time. They have, in Britain, no 'legal' effect.[4]

Compulsory arbitration is in this country a war-time phenomenon. The term is not free from ambiguity. It means in fact two different things: Industrial arbitration is called compulsory if both employers and employees (or their organisations) must submit to the proceedings before an independent tribunal with a view to settling their disputes or differences. The term 'compulsory arbitration' may also indicate that the award of the tribunal is enforceable, 'law' as between individual employers and employees or a 'fictitious contract' as between the organisations on both sides. Compulsory arbitration was first introduced in 1915 for the munitions industries[5] and remained in force until November 21, 1919.[6] It was revived for the whole of industry after Dunkirk, in 1940,[7] and is, at the moment of writing, still the law of the land.[8] Under the legislation of both World Wars industrial arbitration was (and is) compulsory both in the procedural and in the substantive sense: the tribunal deals with the dispute irrespective of the consent of the parties,[9] and its award is binding as an implied term

[4] See Rice, 'Collective Labour Agreements in American Law', (1931) 44 Harv. L.R. 572. Tillyard and Robson, 'The Enforcement of the Collective Bargain in the United Kingdom', (1938) 48 Economic Journal 15. Kahn-Freund, 'Collective Agreements under War Legislation', (1943) 6 Mod.L.Rev. 112. The collective agreement is not legally immune against being contracted out even between an organised employer and an organised employee. Nor is there, in this country, any general rule to correspond to the Australian legislation by which a collective bargain can be made the 'common rule' of the trade. For a decision of the Privy Council on this Australian legislation, see *True* v. *Amalgamated Collieries of West Australia, Ltd.*, [1940] A.C. 537.

[5] Munitions of War Act, 1915 (5 & 6 Geo. 5, c. 54), s. 1, subsequently amended by s. 2 of the Munitions of War (Amendment) Act, 1916 (5 & 6 Geo. 5, c. 99), and by s. 6 (2) of the Munitions of War Act, 1917 (7 & 8 Geo. 5, c. 45). See also Wages (Temporary Regulation) Act, 1918, s. 2. In this legislation the 'dispute' is invariably described as a 'difference'. The definition of the 'difference' in s. 3 of the 1915 Act—subsequently amended by s. 9 of the 1916 Act—leaves no doubt that what is meant is a dispute as to what should be the rights and duties of employers and employees, not a 'question' as to what are their legal obligations. In the 1918 Act, however, 'differences' *de lege lata* and 'differences' *de lege ferenda* are lumped together (in s. 2 (2)). They were separated by the Schedule to the Industrial Courts Act, 1919. In relation to the former the 1918 Act remained in force until September 30, 1920, as to the latter it was superseded by the Industrial Courts Act on November 21, 1919.

[6] For further cases of compulsory arbitration under the legislation of the First World War: s. 4 (2) of the 1915 Act—amended by s. 11 of the 1916 Act—as to 'controlled' establishments; s. 8 of the 1916 Act as to female workers and 'dilutees'. For the dramatic events which formed the background of the legislation quoted in this and the previous note, Askwith, *Industrial Problems and Disputes*, 1920, Chaps. 35, 36, 37, 38, 39 and 41. Amulree, *Industrial Arbitration in Great Britain*, 1929, Chaps. 14, 15, 16.

[7] Conditions of Employment and National Arbitration Order, 1940, made under Regulation 58AA of the Defence (General) Regulations, 1939 (Statutory Rules and Orders, 1940, No. 1305), Art. 2.

[8] By virtue of the Supply and Services (Transitional Powers) Act, 1945 (9 & 10 Geo. 6, c. 10), for which see Robson in 9 Mod.L.R. p. 172.

[9] Under the legislation of both World Wars the 'difference' or 'dispute' may be reported to the relevant Government department, which must—within a

of the contracts of employment,[10] without, however, being a 'contract' between the organisations. The compulsory award is thus quite clearly a piece of delegated legislation. The tribunal makes new law. It does not purport to interpret an existing norm, to declare what were the rights and duties of employers and workers when the dispute arose. It settles the dispute by laying down what are to be these rights and duties in future. There is a 'difference', a 'dispute', but not a *lis* in the sense that any existing legal norm could be applied. What is at stake is exclusively a conflict of interests, not a conflict of rights.

Minimum wage legislation is now being used in this country in order to remould the contents of collective agreements in the form of a statutory order emanating from a wages council or other wage regulating authority. This type of legislation may often serve purposes similar to those which the measures described below seek to attain. Whatever may be the form in which wage regulating authorities proceed, the result of their labours is always a change in the law, and never an application of existing norms. The present paper does not deal with them.[11]

Enforceable collective agreements—compulsory awards—statutory wage regulations—is there a fourth method by which conditions of employment can be legally controlled?

II

Since 1891 Parliament has tried to use a method of setting up fair labour standards which, at first sight, seems to have little bearing on the problems of litigation and legislation. An attempt was made to enlist the bargaining strength of the Government itself as a contracting party so as to establish a standard of fairness in industrial relations. On February 13, 1891, the House of Commons passed the first Fair Wages Resolution, a resolution which was destined to be the first step in a momentous development, momentous in legal

stated period—'refer' it for settlement, if possible, to a voluntary arbitration tribunal established by collective agreement, or else either to an *ad hoc* arbitrator, or to a statutory arbitration agency, *i.e.*, under the 1915–1917 legislation the 'Committee on Production' or the special arbitration tribunal for female workers and 'dilutees', and under the present legislation to the National Arbitration Tribunal. These provisions are linked with the prohibition to resort to stoppages in connection with a trade dispute without having reported it to the Minister and until the statutory period has elapsed without action having been taken by the Minister—Munitions of War Act, 1915, s. 1 (2) (as amended by s. 2 of the 1916 Act), ss. 2, 4 (2), and First Schedule; Munitions of War (Amendment) Act, 1916, s. 8; Munitions of War Act, 1917, ss. 1 (2), 6, 7; Wages (Temporary Regulation) Act, 1918, s. 2 (here the 'Interim Court of Arbitration' is substituted for the 'Committee on Production'). Conditions of Employment Order, 1940, Arts. 2, 4.

[10] In addition, non-observance is a criminal offence. See, for civil and criminal sanctions: 1915 Act, s. 1 (4); 1918 Act, ss. 2 (3), 5 (2); 1940 Order, Art. 2, para. 5, Defence Regulation 92. By s. 5 of the Munitions of War Act, 1917, the Minister of Munitions was empowered to make a compulsory award the 'common rule' of the trade.

[11] The most important enactment is the Wages Councils Act, 1945 (8 & 9 Geo. 6, c. 17).

as well as in social history. The wording of the resolution was as follows [12]:

> That in the opinion of this House, it is the duty of the Government in all Government contracts to make provisions against the evils recently disclosed before the Sweating Committee,[13] to insert such conditions as may prevent the abuse arising from sub-letting, and to make every effort to secure the payment of such wages as are generally accepted as current in each trade for competent workmen.

This resolution made history, but its pre-history also deserves attention in view of subsequent events.[14] It was preceded by an agitation emanating, to a large extent, from the London Society of Compositors and supported by the Parliamentary Committee of the Trades Union Congress. This agitation was, in the first place, concerned with the behaviour of His Majesty's Stationery Office, the Government department charged with the publication of official and semi-official documents, and an early example of a 'nationalised' industry. As early as 1884 the pressure of public opinion had compelled the Office to insist on the observance of 'trade union rates' by the printing firms whom they employed. From 1889 onwards local authorities in London, including the London County Council, found themselves induced by the pressure of the electorate to adopt a 'fair wages' policy in all its dealings with contractors. It was a campaign waged successfully in the field of local as well as Parliamentary elections which led, by the middle of the 'nineties, to the passing of 'fair wages resolutions' by some 150 local authorities, and to the resolution quoted above. The Central Government as well as local authorities were thus, on paper at least, forced by trade union pressure 'to repudiate the old principle of buying in the cheapest market',[15] and not only to become 'model employers' but to use their own economic strength to force others to become model employers as well.[16] The link between 'fair wages' and what later came to be known as 'recognised terms and conditions' was forged even before the first resolution was passed.

It is no doubt possible to exaggerate the practical effect of these early resolutions in an atmosphere heavily charged with the anti-unionist feelings roused by the 'New Unionism' which began to spread with the Dockers' Strike of 1889.[17] Nevertheless, as harbingers of things to come, these measures were of first class significance. If we look at them in the light of later experience we

[12] See *Industrial Relations Handbook*, published by the Ministry of Labour and National Service, 1944, p. 133.

[13] This refers to the Fifth Report from the Select Committee of the House of Lords on the Sweating System, 1890. For this: D. Sells, *British Wages Boards*, Brookings Institution, Washington D.C., 1939, p. 15. The Fair Wages Resolutions are discussed, *ibid.*, pp. 45–47.

[14] For what follows, see Webb, *History of Trade Unionism*, 1926 ed., p. 398.

[15] Webb, *l.c.*, p. 398.

[16] See Howell, *Labour Legislation, Labour Movements, Labour Leaders*, p. 457.

[17] See Webb, *Industrial Democracy*, 1926 ed., p. 555.

can see in them an early refutation of the thesis that the extension of public at the expense of private enterprise involves a deterioration in the position of the workers. The early fair wages resolutions prove, if proof was necessary, that Government and semi-Government agencies, being exposed to the pressure of public opinion, can, in a democratic society, be constrained to comply with fair labour standards. Or, to put it in a different way: that the loss in industrial bargaining power which the unions might incur with the spread of public ownership may be counterbalanced by their legitimate political influence through the elected representative organs of Government.

It is, however, the legal aspect of the fair wages resolutions—whether Parliamentary or local—which is our concern. Are these resolutions 'law'? If 'law' is a body of norms safeguarded by sanctions administered by the courts, the answer must surely be in the negative. The passing of a Fair Wages Resolution by the House of Commons was not an act of legislation, the resolution not an Act of Parliament. At best it imposed a disciplinary duty upon the civil servants charged with the making of Government contracts. An official who adopted a policy which flouted the principle of the resolution might have been taken to task by his Minister, the Minister might have been exposed to a vote of censure by the House of Commons to which he was responsible, in the last resort the House might have refused to grant a Government unwilling to act on the resolution the financial means on which it depended. But all this is not, in the legal sense, 'enforcement', or a 'sanction'.[18] Once the resolution was translated into a contractual term as between the Government department and the contractor, it would no doubt be enforced. It became a condition of the contract, and its violation would give the Government a right of rescission or damages according to the established principles of the common law. But the lawyer must insist that what would then have been enforced would have been the contract, not the resolution. The resolution was 'law' no more than is an international treaty which may bind the Government in international law, but which cannot be invoked by a party in an English court unless and until it has been translated into legislation by Act of Parliament.[19]

Those most interested in the fair wages resolutions adopted by the House of Commons and by local authorities were, of course, the unions and their members. From their point of view these clauses were, whatever the lawyer may say, one of the corner-stones of British labour 'law'. And yet, the considerable benefits which they derived from these measures were entirely due to what Ihering described as one type of 'reflex effects' of the law, 'the operation of a legal or economic fact in favour of third persons beyond its

[18] Not, at any rate, according to the traditional theory established by Dicey's *Law of the Constitution*, Chaps. 1, 11.

[19] Oppenheim-Lauterpacht, *International Law*, Vol. 1 (6th ed.), p. 38.

inherent sphere of effectiveness as established by law '.[20] There is—and perhaps must be—a gaping gulf between the world of the dogmatic lawyer and the world of the sociologist. To the latter, fair wages clauses and minimum wage legislation are all of a piece and part and parcel of one development, to the former they have nothing in common.

III

In order to understand the further development one must look a little more closely at the wording of the resolution quoted above. It was, in the first place, directed against ' sweating ', and must thus be read together with the first Trade Boards Act of 1909, which tried to combat the same evil.[21] In the second place, it attempted to deal with a species of law evasion, known all over the world where social legislation exists, *viz.*, the dodging of the legal protection given to an employee by making him appear as an independent contractor, or by clothing the substance of a contract of employment into the form of a contract of work and labour.[22] But, thirdly, there appears at the end the obligation to secure the payment of ' current ' wage rates. One can feel—after more than half a century—the late Victorian hesitation to call things such as trade union rates by their proper names. Still, it was a remarkable first step, not yet an open acknowledgment, it is true, that fair standards were trade union standards, but an insistence, at any rate, that what was customary had to be observed by everybody, that what was normal had to be normative. And since what was customary and normal was, in practice, so largely determined by collective bargaining, we see here *in nuce* the beginning of that close connection between fair wages clauses and collective agreements which was foreshadowed by the history of the events leading up to the adoption of the clause, and was to be of such fundamental importance for the further development of the law.

When the curtain opened again for the Second Act in 1909, the scene and many of the actors had changed, but Sidney Buxton, who had introduced the 1891 resolution, was still among them. He was now in the—from our special angle—pivotal position of Postmaster-General. It was he who moved the Second Fair Wages Resolution which the House of Commons adopted on March 10, 1909, and which read as follows[23]:

That, in the opinion of this House, the Fair Wages Clause in

[20] Ihering, *Gesammelte Aufsätze* (Collected Papers), Vol. 2, p. 79.

[21] See the reference to ' exceptionally low wages ' in s. 1 (2) of the Trade Boards Act, 1909 (9 Edw. 7, c. 22).

[22] See, *e.g.*, the situation envisaged by s. 9 of the Trade Boards Act, 1909, and by s. 9 of the Road Haulage Wages Act, 1938 (1 & 2 Geo. 6, c. 44).

[23] *Industrial Relations Handbook*, *l.c.*, p. 134. An Advisory Committee on the Fair Wages Clauses of Government Contracts was subsequently appointed. For its principal recommendations, see Milne-Bailey, *Trade Union Documents*, 1929; p. 382. For the facts in the text, see the speech by Mr. Isaacs, the Minister of Labour, in the House of Commons, 427 Hansard, col. 619 sq.

> Government contracts should be so amended as to provide as follows: The Contractor shall, under a penalty of a fine or otherwise, pay rates of wages and observe hours of labour not less favourable than those commonly recognised by employers and trade societies (or in the absence of such recognised wages and hours, those which in practice prevail amongst good employers) in the trade and district where the work is carried out. Where there are no such wages and hours recognised or prevailing in the district, those recognised or prevailing in the nearest district in which the general industrial circumstances are similar shall be adopted. Further, the conditions of employment generally accepted in the district in the trade concerned shall be taken into account in considering how far the terms of the Fair Wages Clauses are being observed. The Contractor shall be prohibited from transferring or assigning directly or indirectly to any person or persons whatever any portion of his contract without the written permission of the Department. Subletting other than that which may be customary in the trade concerned, shall be prohibited. The Contractor shall be responsible for the observance of the Fair Wages Clauses by the sub-contractor.

A lawyer reading this document will notice, in the first place, that Parliament requested the Government departments to insert in their contracts a term that would be illegal and void at common law. 'A penalty of a fine or otherwise' cannot, of course, in English law, be validly promised in a contract. Consequently, in practice, the Government recommended to its agencies not to act on this part of the resolution.[24]

However, this is a minor matter. The first point of importance is that the resolution enjoins the Government to insist not only on a fair standard of wages, but also on a maximum of hours of labour, and, generally, on the observance of customary 'conditions of employment'. The measure was (and is) still commonly called a 'fair *wages* resolution', but it had now, in fact, become a 'fair labour standards resolution'. This is all the more remarkable if the parallel developments in legislation are taken into account. It was not before 1938 that wage regulating authorities, such as trade boards and agricultural wages committees, were empowered to fix holidays and holiday remuneration.[25] Hours of work have been fixed by legislation for women and young persons, but, except in coal mining underground, in road transport and one or two minor instances, not for adult male workers.[26] Wherever we meet in English law with State interference in the conditions of employment,

[24] The Government acted on the advice of the Committee mentioned in the previous note, *Industrial Relations Handbook*, *l.c.*, p. 135. The clause was omitted in the Fair Wages Resolution of 1942 which is now in force (see below). It is surprising to find it in Appendix IV of the Circular of the Ministry of Health (No. 520) to Local Authorities on the Housing (Financial Provisions) Act, 1924, see Hill, *Complete Law of Housing*, 3rd ed., p. 550.

[25] Holidays with Pay Act, 1938 (1 & 2 Geo. 6, c. 70).

[26] In practice wage regulating authorities influence hours of work by fixing overtime rates. For hours of work legislation, see, *e.g.*, Factories Act, 1937,

we see that it is—apart from health, safety, and welfare—remuneration and holidays which are the objects of legislation. Other 'conditions', including vital matters like the eight-hour-day, trade union recognition,[27] and the limitation and regulation of apprenticeship,[28] are left to voluntary bargaining, and it is significant that Britain's refusal to ratify the ILO Hours-of-Work (Industry) Convention of 1919 [29] does not seem to have met with any serious resistance on the part of the workers or their organisations. Hence, the resolution of 1909, goes, in this respect, beyond what Parliament was prepared—or even invited—to do by way of legislation. The Government was requested to set in its administrative practice a standard above that enforced by the 'law' in the narrow sense.

The second point of interest is that the Edwardian Liberals felt no longer bound to conceal their insistence upon the trade union rate of wages and the trade union standard of hours. As far as wages were concerned, this was a change in expression rather than in substance—except that, following the recommendations of a committee under the chairmanship of Sir George Murray, the Secretary to the Treasury,[30] Parliament, by enforcing the trade union rate, ensured a higher degree of uniformity in the contract practice as between the various departments than seems hitherto to have prevailed. The formulation: 'not less favourable than those commonly *recognised* by employers and trade societies' makes it evident that the contents of collective agreements were not as such regarded as the 'fair' standard. Not because they were agreed upon, but because they were 'recognised', *i.e.*, commonly acted upon, did they become the measuring rod of 'fairness'.[31] It was not the rule *pacta sunt servanda* which Parliament sought to carry into effect. Collective bargaining became relevant not as an act of contract making, but as the crystallisation and formulation of what was customary. Hence, a collective agreement which remained a *brutum fulmen*, which failed to secure obedience to its terms in practice, was incapable of yielding a standard of fairness. On the other hand, a practice commonly observed *was* such a standard,

s. 70 sq.; Shops Act, 1934; Coal Mines Act, 1911, ss. 91–95; Coal Mines Regulation Acts, 1908 and 1932; Road Traffic Act, 1930, s. 19 as amended.

27 For exceptions in the temporary legislation of the First World War: Munitions of War (Amendment) Act, 1916, s. 15 (legal guarantee for the restoration of the closed shop after the war). Munitions of War Act, 1917, s. 9 (legal guarantee of freedom to organise).

28 For an exception, see s. 3 of the Agricultural Wages (Regulation) Act, 1947. See also, Sells, *l.c.*, pp. 190–195.

29 The Washington Convention is reproduced in Art. 97 sq. of the International Labour Code, Montreal, 1941.

30 *Industrial Relations Handbook*, *l.c.*, p. 134.

31 Section 4 of the defunct Wages (Temporary Regulation) Act, 1918, shows the contrast between the enforcement of a 'recognised' rate of wages (s. 4 (*a*)) and an 'agreed' rate (*ibid.* (*d*)). For an analysis of the difference between a 'standard' rate, a 'minimum' rate (in the American sense) and a 'prevailing' rate (='minimum' within the meaning of British wages regulating legislation), see Sells, *l.c.*, p. 6. The Resolutions of 1891 and 1909 insist upon a 'prevailing' rate, that of 1942 (see below) upon the 'standard' rate.

even though it had never been reduced to the codified terms of a written agreement. All this is significant in view of later developments.

Thirdly, we see here for the first time the procedure in operation by which a standard of fairness is defined in the absence of a relevant 'practice' directly applicable. The social importance of this cannot be exaggerated. For it was in those sectors of industry and business in which unions were weak and recognised practices unlikely to develop that the Government's action as a pace-maker of social progress was most urgently needed. Here the resolution calls in aid two subsidiary standards: in the first instance, the practice prevailing amongst 'good employers' and in the second instance, the practice of the nearest comparable district. The purpose of this formulation is clear: measures of this kind aim at protecting the 'good' (often the large) employer against the unscrupulous 'undercutter' no less than the workers of the latter against their master. The alternative use of a number of standards, the criterion of 'similarity'—all these were things to develop into a far more elaborate system in the course of time.

Easily the most important point in practice, however, was the reference to sub-contractors. Whatever one may think about the habits of trade associations and big manufacturing firms which enforce price minima in the dealings between their customers and their customers' customers, and down even to the third stage, here we have a case in which the often decried practice of 'tying the second stage'[32] was put to good uses. The contractor must guarantee the observance of recognised terms by his own sub-contractor. If the sub-contractor exploits his men, the head-contractor may have to face a claim for rescission or for damages. It is believed—though it is impossible to prove the point—that this extension of the fair wages clauses to sub-contractors (which was reproduced in the clauses passed by local authorities)—was an especially powerful lever in establishing the habit of obedience to collective standards, far beyond the immediate field of operation of the resolutions. The fair wages clauses mobilised the employer's self-interest in the service of these standards. They thus obviated the need for 'direct' action either in the courts or on the battle-field of industrial relations. It can be said with confidence that, to some extent, it is this system of fair wages clauses which accounts for the functioning in this country of voluntary collective bargaining without legal sanctions.

IV

We must now interrupt the story of the gradual development of fair wages standards towards standards of collective bargaining.

[32] For a good example, see the manufacturers' conditions of sale in the tobacco trade printed in Dix, *Law of Competitive Trading*, p. 126. There is a great deal of case law on such conditions. The best-known example is *Dunlop Pneumatic Tyre Co., Ltd.* v. *Selfridge & Co.*, [1915] A.C. 847.

So far, the history of the sanctions attached to these clauses has been uneventful. In this respect the situation on the eve of the First World War is very much like that of the 'nineties. It is as a contractual term and nothing else that the standard of fairness can receive the protection of the law. No other means of legal enforcement seems to exist.

It was the legislation passed during and immediately after the First World War which first gave rise to a new type of procedure, not, it seems, very deliberately, and only as a by-product of compulsory arbitration. None the less it is worth while to cast a glance at these long forgotten enactments which, to some extent, served as models for a new system of law enforcement evolved in our own time.

The bulk of the war-time labour legislation of the years 1915 to 1917 was passed with the object of guiding disputes on wage rate adjustments into the channels of arbitration. The obligation, therefore, which these laws imposed upon employers and workers was to abstain from making changes otherwise than by way of arbitration, and to abide by the terms of the awards.[33] In a number of instances, however, it was the statute itself, without the interposition of an award, which established such liabilities, *e.g.*, the duty incumbent on workers in controlled establishments not to apply restrictive practices during the war,[34] and the obligation of employers to pay, during the transitional period following the armistice, the 'prescribed' rate of wages.[35] In these case it was obviously expedient to use the arbitration tribunals, whose members were thoroughly familiar with industrial disputes, for what was called the 'settlement' of the question whether or not the employers or workers had acted in accordance with their statutory duties.[36] The functions of these tribunals, such as the Committee on Production during the war, the Interim Court of Arbitration immediately afterwards, and, finally, the Industrial Court,[37] was,

[33] See notes 5 and 6 above.

[34] Munitions of War Act, 1915, s. 4 (3), (4), and Second Schedule. Munitions of War Act, 1917, s. 8 (2). For the history of these provisions, see Askwith, *l.c.*, pp. 367–368. According to Lord Askwith they were 'soon found to be of small value' (*ibid.*, p. 391).

[35] Wages (Temporary Regulation) Act, 1918, s. 1. For the criminal sanction: *ibid.*, subs. (1). For the civil sanction: *ibid.*, subs. (2) and s. 2 (3). For the administrative sanction (inspection): s. 3.

[36] Munitions of War Act, 1915, s. 4 (4). Wages (Temporary Regulation) Act, 1918, ss. 2 (2), (3), 5 (2). Note the careful distinction made between a difference *de lege lata* and a difference *de lege ferenda* in s. 2 (2), and, as regards procedure, in the proviso. Note, too, that, while the settlement of both types of difference was transferred from the Interim Court of Arbitration to the Industrial Court as from Nov. 21, 1919, the Act of 1918 continued to apply to differences *de lege lata* until Sept. 30, 1920, but that, during this interval, the Industrial Courts Act applied to disputes *de lege ferenda*. The result was that, during the first ten months of its existence, the Industrial Court made legally binding judgments on existing rights, and non-compulsory awards on rights to be created. Industrial Courts Act, 1919, s. 6 and Schedule.

[37] For the Committee on Production, see Askwith, pp. 366 *et seq.*, Amulree, pp. 123 *et seq.* Munitions of War Act, 1915, First Schedule. For the

in these cases, declaratory, *i.e.*, judicial in the usual sense. There is nothing in the relevant enactments to suggest that the tribunals were empowered to allow this judicial function to merge in the legislative function they were exercising as industrial arbitrators.[38] The decisions of the Industrial Court, rendered during the first few months of its existence, indicate quite clearly whether the court was acting in one capacity or another.[39] Yet, once a body generally regarded as an arbitral, *i.e.*, a law making, tribunal had been charged also with the task of declaring law by way of 'settlement', the way had been opened towards a form of law enforcement which would not only entrust a quasi-legislative agency with the declaratory powers of a court, but would enjoin them to solve the problem of finding the law by 'settling' new law. The line between the two processes was not blurred as yet, nor was there —in view of the fixity of the statutory standards to be applied— any need for blurring it, but the wielding of two powers by one institution must have dimmed the awareness of all concerned that two very different types of activity were involved.

The Industrial Court is a mixed arbitration tribunal, composed of independent members and employers' and employees' representatives.[40] It was established by an Act passed in November, 1919, and it was, in every sense—in its composition and also in its functions—the direct successor of the Interim Court of Arbitration which was itself the offspring of the Committee on Production set up in 1915.[41] But, lest it should be thought that 'war is the father of all things', the parentage of the Industrial Court must also be traced back to a Standing Court of Arbitration established under the Conciliation Act, 1896,[42] in September, 1908, and from this ancestor it inherited what is, in a legal context, its most prominent feature : the purely voluntary nature both of its proceedings and of its awards under the Act of 1919.[43] No sooner had hostilities come to an end than the healthy dislike of the British working class for compulsory arbitration was revived,

Interim Court of Arbitration, Amulree, pp. 147 *et seq.*, and Wages (Temporary Regulation) Act, 1918, s. 2. For the Industrial Court, see below.

[38] See note 36, p. 279 *supra*.

[39] Compare, *e.g.*, Decisions 1, 2 and 5 with Decisions 3, 4, 6, 7, 8 and 10 in Vol. 1 of the Official Collection of the Decisions of the Industrial Court.

[40] Industrial Courts Act, 1919 (9 & 10 Geo. 5, c. 69, s. 1). The court and its procedure are described by its first President, Sir W. Mackenzie (later Lord Amulree) in *The Industrial Courts Act, Practice and Procedure*, London, 1923.

[41] See Amulree, *Industrial Arbitration*, Appendix I.

[42] 59 & 60 Vict. c. 30. For the Standing Court, see Stoker, *l.c.*, pp. 3–6, Amulree, *Industrial Arbitration*, p. 113, Askwith, p. 127. The institution was not—according to Askwith—of great practical importance before 1914. Its claim to a place in the books on industrial and legal history is mainly justified by the fact that it served as a model for the Industrial Court.

[43] Industrial Courts Act, 1919, s. 2 (2) ('if both parties consent') and s. 3 (3) (Arbitration Act, 1889, not to apply). See Mackenzie, *Industrial Court*, p. 24, and p. 21, where it is pointed out that the content of a decision may become a term of the contracts of employment by tacit implication. Sir W. Mackenzie quotes two cases to this effect, both only reported in the daily press. This does not, of course, detract from the validity of the statement in the text.

and a 'mild measure of compulsion' which the Government had suggested in its Bill was abandoned in the face of the determined opposition of the unions.[44] Thus none of the decisions of the court under the 1919 Act is more than a suggestion to the parties, but its awards are almost invariably obeyed in practice.[45] The settlement of trades disputes by voluntary arbitration under the 1919 Act is only indirectly connected with the subject-matter of this paper.[46] As an institution, however, the court has been put to services which, as will be seen, concern us very much.

V

After the First World War—and largely as its result—the Government began to regulate business activities to an extent undreamt of before 1914. Government subsidies went through local authorities into housing and also into some of those branches of agriculture whose production had to be stimulated for reasons of security as well as welfare. Other industries had to be protected against foreign competition. Public works had to be encouraged and financially supported in times of depression. Licensing systems had to be introduced for a variety of purposes. In short, the Government appeared in commercial life not only as a party to contracts of work and labour, but, increasingly, as a financier, and, through its administrative agencies, as the controller of the entry into trades and branches of business. It thus gained further opportunities for linking the grant of subsidies, of loans and guarantees, and of licences, with the observation of fair labour standards. In doing so, it merely continued the policy embodied in the pre-War Fair Wages Resolution. But Parliament, now expressed this fair standards policy in the form of statutes and no longer merely in the form of resolutions, thus endowing the fair wages clauses with legal characteristics totally different from those they used to have in the early days. Not only new formulations but new sanctions were devised for an established policy. It is these new sanctions which led to the invention of a novel method of delegated legislation by means of semi-judicial decision.

For good or ill, the British Government, haunted by the nightmare of the sugar shortage of the First World War, decided to subsidise the British sugar industry, and, to carry this policy into effect, Parliament passed the British Sugar (Subsidy) Act, 1925.[47] The beneficiaries of this policy had to conform to a number of conditions, only one of which need be mentioned here. By

[44] Amulree, *l.c.*, p. 171.
[45] Amulree, *l.c.*, p. 179.
[46] Industrial Courts Act, ss. 1 (1), 2 (3).
[47] 15 Geo. 5, c. 12. Later in the same year, when the Treasury guarantee for the British Empire Exhibition was increased, a fair wages clause almost verbally identical with that of the Sugar (Subsidy) Act was inserted in the statute by which Parliament gave the necessary authority. British Empire Exhibition (Guarantee) Act, 1925, s. 3 (15 & 16 Geo. 5, c. 26).

section 3 of the Act 'the wages paid by any employer to persons employed by him in connection with the manufacture of sugar or molasses in respect of which a subsidy is payable under this Act shall, except where paid at a rate agreed upon by a joint industrial council representing the employers and the persons employed, not be less than would be payable if the manufacture were carried on under a contract' containing a fair wages clause in accordance with any fair wages resolution of the House of Commons 'for the time being in force'.

Thus, the fair wages clause makes its appearance in a statute.[48] What happens if the statutory obligation is violated? The contractual remedies—rescission, damages—will not help because there is in this case no contract between the Government and the manufacturers. The subsidy has, ex hypothesi, been paid. To try to recover it would be an unrealistic policy. A new form of sanction had to be devised. It was accordingly provided that 'any dispute' which arises 'as to what wages ought to be paid in accordance with this section' 'shall be referred by the Minister[49] to the Industrial Court for settlement'.

[48] This appears to be the first case of a statutory Fair Wages Clause, but it is not the first case of a reference to fair wages clauses in the Statute Book. Such a reference occurs at first in s. 4 (2) of the Munitions of War Act, 1915. Since 1924 local authorities and charitable societies, trusts, etc. have been put under statutory obligations to insert fair wages clauses into building contracts subsidised by the Government. By the Housing (Financial Provisions) Act, 1924 (14 & 15 Geo. 5, c. 35), s. 3 (1) (*d*)—repealed by the Housing Act, 1935—and s. 3 (2) (*d*) a local authority or society qualifies for an increased Government contribution to the erection of houses by complying with the fair wages clause, the sanctions (s. 3 (4)) being the Minister's power to discontinue, reduce or shorten the duration of the contribution. For identical provisions with reference to another subsidy: Housing Act, 1930 (20 & 21 Geo. 5, c. 39), s. 27 (1) (*c*), (3); Housing (Scotland) Act, 1930, (20 & 21 Geo. 5, c. 40), s. 24 (1) (*e*), (3). A much more general obligation is imposed upon local authorities by s. 72 (3) (*a*) of the Housing Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 51) and by the corresponding provision in the Housing (Scotland) Act, 1935 (25 & 26 Geo. 5, c. 41). A local authority which exercises its special powers for the erection of houses for the working classes—with or without Government assistance—must secure 'that a fair wages clause complying with the requirements of any resolution of the Commons House of Parliament for the time being in force with respect to contracts of government departments is inserted in all contracts for the erection of the house'. Under all these statutes the local authorities (or charitable societies) are placed under a public law obligation to make a particular type of private contract with the builders by which the latter, in turn, undertake to enter into a certain kind of contract with their workmen. These statutory obligations to establish contractual fair wages clauses are quite different from the statutory fair wages clauses discussed in the text. They do not carry the development of the law of fair wages clauses further, either as regards substance or as regards sanctions. The Ministry of Health has issued a circular recommending local authorities to insert a provision for fair wages clauses into the standing order for the regulation of their proceedings and business which they have power to make under s. 75 of, and Schedule III, Part V, No. 4 to, the Local Government Act, 1933 (23 & 24 Geo. 5, c. 51). See 21 *Halsbury's Laws of England* (Hailsham Edition), p. 229, note (*o*).

[49] Originally the Minister of Agriculture and the analogous Scottish department, now—Sugar Industry Act, 1942 (5 & 6 Geo. 6, c. 16), s. 7 (*b*)—the Minister of Food.

The Industrial Court, however, cannot—under the 1919 Act—impose a legal obligation. Besides, this is not a 'trade dispute'; it is—whatever it may be in substance—a dispute between a sugar manufacturer and the Minister. In order to formulate a sanction it was therefore necessary to convert a voluntary arbitration tribunal into an organ of delegated legislation: the award is a legal norm as between the subsidised employers and their workers.

> As from the date of the award or from such later date as the court may direct, it shall be an implied term of the contract between every employer and worker to whom the award applies that the rate of wages to be paid under the contract shall, until varied in accordance with the provisions of this section, be in accordance with the award.[50]

Before discussing the significance of this enactment it is appropriate to see how it works in practice. On November 13, 1925, there came before the Industrial Court a dispute concerning 'the wages proposed to be paid by the English Beet Sugar Corporation, Ltd., to General Labourers and Chargehands employed at their factory at Cantley, Norfolk'. In the Official Collection of the decisions of the Industrial Court [51] the case appears in exactly the same form as the cases under the Industrial Courts Act by which it is surrounded. It starts by mentioning as 'Parties': 'The National Union of General and Municipal Workers and The English Beet Sugar Corporation, Ltd.'. The Minister of Agriculture is not a party to the proceedings. The terms of reference are:

> To consider a dispute which has arisen under section 3 (1) of the British Sugar (Subsidy) Act, 1925, by reason of representations by the National Union of General and Municipal Workers that the wages proposed to be paid by the English Beet Sugar Corporation, Ltd., to General Labourers and Chargehands employed at their factory at Cantley, Norfolk, are not in accordance with the intention of that Act, and to settle what wages ought to be paid in accordance with the section concerned.

There follows a detailed description—in memorandum form—of the circumstances in which these workmen are employed, of the nature of their work, the amount of wages, overtime rates and bonuses. It is then said that 'the question submitted to the court is the determination of the minimum rate and the rates for chargehands. The Union claim a minimum rate of 50s. a week'. The operative portion of the award is as follows:

> The court have carefully considered the evidence and arguments placed before them and adjudge and declare that: (a) The appropriate minimum rate for general labourers on shift work employed at the Cantley Factory . . . shall be 46s. for a week of 48 hours. (b) The present practice at the factory is to pay one uniform or flat rate for day work and night work.

[50] Section 3 (2).
[51] No. 1140, Vol. 7, p. 283.

> The rate now fixed continues this practice and takes into account the fact that the three shifts consist of a day shift, intermediate shift and night shift. (c) The rate herein determined is a basic time rate and does not interfere with the existing bonus on output or any other system of payment by result which the parties may agree upon. (d) The existing differentials for chargehands shall be paid on the weekly rate of 46s.

This decision illustrates and explains—far better than any theoretical analysis could have done—the point that the obligation to pay fair wages imposed by the statute is not in itself the subject-matter of the proceedings at all. The decision reads exactly like any other industrial arbitration award and partly like the order of a wage-regulating authority. It shares with the former the characterisation of the parties, the formulation of the 'dispute' in the terms of reference as a difference on rights to be created rather than existing rights to be enforced. It shares with the latter the legal nature of the result of these proceedings: an order which confers rights upon the individual workers and changes the content of their contracts of employment. It can, on the other hand, be rendered only if the fulfilment or non-fulfilment of a statutory obligation is in dispute, and it is not therefore 'compulsory arbitration' in the proper sense.

To put it in a different way: the law says to the employer:

> You must pay 'fair' wages. This is a legal obligation. If you violate this obligation, nobody will be able to claim these 'fair' wages from you, but the wages you will have to pay in future will be fixed by a legislative act.

The sanction of the existing obligation consists exclusively in opening the way towards the creation of another obligation for the future.

That this is a proper analysis of this type of legislation is shown by the exception to the statutory obligation to pay fair wages. Where the wages paid are in conformity with that form of collective agreement which is known as the decision of a joint industrial council,[52] the door which leads to the proceedings before the Industrial Court is blocked. Voluntary machinery displaces statutory machinery, collective regulation has precedence over delegated legislation—the most fundamental principle of British labour law [53] appears here in a novel form. It appears in the form that the complaint of unfairness, that is, the request for the making of new law, cannot be made where the collective will of the two 'sides' in the industry has established a customary standard which has been obeyed.

Only in the absence of such a standard, a standard unsupported

[52] *I.e.*, a mixed representative body comprising employers and employees and constituted in accordance with the recommendations of the Whitley Report, 1918 (Cmd. 9081).

[53] See, *e.g.*, Industrial Courts Act, s. 2 (4).

by any legal sanctions, does the law-making machinery begin to operate. It begins to operate only in the marginal case. Where there is peace—no 'dispute', no 'complaint'—there need be no 'law'. Do we want a systematic order of legal rules enforceable by legal remedies? We do not. Let us wait and see. If and as long as industrial relations adjust themselves in a sphere beyond the law, well and good. If there is friction, there is still time to make law, not to find out which party was right, but to say what shall in future be the rights and duties of those concerned. The dispute, and only the dispute, will be the 'peg', the opportunity for the legislative act. It is a dispute about the fulfilment or non-fulfilment of an existing obligation, but that obligation is too general, too vague to be enforced otherwise than by the imposition of another one. The 'fair wages clause' has begun to play the rôle that the 'fundamental law' used to play in the Middle Ages. Small wonder that we are in a dilemma whether to describe the task of the Industrial Court as legislative or as judicial. Legislation by adjudication—is it a new and original contribution to the conceptual arsenal of jurisprudence, or is it a revival of the most ancient form of law-making known to mankind?[54]

VI

This Act of 1925 was deficient in three very obvious respects: In the first place it was a retrograde measure in that, like the Fair Wages Resolution of 1891, and unlike that of 1909, it was confined to wages and failed to deal with hours of labour and other conditions. Later statutes which imposed 'fairness' obligations upon subsidised and licensed undertakings remedied this defect. One example came again from the sugar industry, that problem child of the British economic system which was a source of trouble to so many successive Governments between the wars. By the Sugar Industry (Reorganisation) Act, 1936,[55] a number of sugar manufacturing companies were compulsorily amalgamated into the British Sugar Corporation, Ltd., which was to receive a Treasury guarantee for its debentures and further financial assistance. At the same time the entry into the sugar refining business was controlled by a licensing system. Section 23 of the Act imposes the 'fair wages' obligation upon the new corporation itself and upon the licensed refiners. But now this obligation was extended to include conditions of employment other than wages. 'Fair wages' and 'fair conditions' are minimum standards. Whether wages are fair or less than fair can be ascertained—notionally—by a simple arithmetical comparison. But where 'conditions' other than wages are involved the application of the criterion of 'fairness' becomes a more subtle process. Hence we see how in this post-1925 legislation

[54] McIlwain, *l.c.*, p. 16, Seagle, *The Quest for Law*, p. 69.
[55] 26 Geo. 5 & 1 Edw. 8, c. 18.

there appears the difficult test of what is 'less' or 'more favourable' to the worker. The employer's duty is to pay wages and observe conditions 'not less favourable' than those corresponding to the Fair Wages Resolution. The quasi-legislative jurisdiction of the Industrial Court was, of course, correspondingly extended from wages to other conditions, and the court thus enabled to fix hours of work, holidays, allowances, etc. This section in the 1936 Act became a common form. It recurs verbally in section 27 of the Air Navigation Act, 1936,[56] which empowered the Government to subsidise carriers by air of passengers or goods. We find it again in a statute which, without providing for a subsidy, gave valuable support to a branch of British industry : section 34 of the Cinematograph Films Act, 1938,[57] binds all producers of films in Britain to the 'fair conditions' obligation, as a return for the benefits of the film quota system, which they obtained under the statute and by which the showing of British films in British cinemas was enforced. When, later in the same year, the producers and curers of bacon were protected against competition by a statute which made the carrying on of these trades dependent on a licence, they were made to conform to fair standards by the same clause, now appearing as section 48 of the Bacon Industry Act, 1938.[58]

All these statutes also wipe out a second blemish of the Sugar Act of 1925 : compliance not only with a decision of a joint industrial council, but with any collective agreement to which the employer and a union representing the workers concerned are parties, precludes the interference of the Industrial Court.[59]

A more significant development beyond the Act of 1925, however, was occasioned by what was, undoubtedly, its most serious shortcoming. It does not, at any rate in express terms, give sufficient guidance to the Industrial Court as to the considerations it ought to have in mind when making its award. The Fair Wages Resolution to which it refers embodies certain standards, and although the Industrial Court does not—as we have seen—enforce these standards, but merely uses their violation as an occasion to impose a new obligation, the content of the resolution will no doubt be taken into account by the court despite its lack of direct relevance for the decision. Thus, where a collective agreement is directly applicable or, failing this, where there is an ascertainable practice of good employers, the court will be inclined to mould its own ruling in accordance with such agreements or practices, and it will, in the spirit of the resolution, look at the recognised conditions or prevailing practices in the nearest comparable district and applicable to the same work. It will not

[56] 26 Geo. 5 & 1 Edw. 8, c. 44.
[57] 1 & 2 Geo. 6, c. 17.
[58] 1 & 2 Geo. 6, c. 71.
[59] The Cinematograph Films Act refers only to agreements, not to joint industrial councils. The Road Traffic Act, 1930, s. 93 (1) (see below) omits the exception altogether.

enforce any of these standards, but it will use them as material, much as a draftsman formulating, say, a rule of company law will take as his model the practices observed by the most responsible and reputable companies.[60] But, in the absence of any of the guiding signposts set up in the Fair Wages Resolution itself, where is the court to obtain its criteria and material? Here was a gap in the law, and a comparison of the Acts of 1936 and 1938 with the Act of 1925 shows that the draftsmen were anxious to close it. All these statutes contain identical clauses to the effect that, in arriving at its decision, the court

> shall have regard to any determination that may be brought to its notice relating to the wages or conditions of service of persons employed in a capacity similar to that of the persons to whom the reference relates, being a determination contained in a decision of a joint industrial council, conciliation board or other similar body, or in an agreement between organisations representative of employers and workpeople.[61]

Thus the element of 'similarity'—the simultaneous or alternative use of a number of collective regulations—was here extended from the geographical into the occupational sphere. Not only regulations for the same work in similar districts, but also regulations for similar work in the same district or other districts shall be within the consideration of the court; and, indeed, in many cases it will be unable to find regulations designed to apply precisely to the work in question, and be compelled to have recourse to 'comparative' research. But even where there is a regulation directly relevant, the court must draw its net very wide. For—it cannot be sufficiently emphasised—it is not its task to enforce existing agreements, but to define its own standards. Let us note in passing that collective agreements regulating the conditions of 'similar' work may be taken into account only if they have been concluded with a trade union by an organisation of employers. A collective agreement concluded by an individual employer cannot yield a standard of relevance to the Industrial Court. We shall revert to this point.

VII

The Fair Wages Resolution of 1909 continued to be incorporated in Government contracts. In 1935 it appeared twice in this contractual form in cases in which the Government acted as financier of public works in its efforts to counteract the deflationary crisis. Electrification and other projects planned by transport undertakers in London and by railway companies were to be financed by

[60] This was the method adopted by the Cohen Committee on Company Law Amendment whose Report (Cmd. 6659) became the basis of the Companies Act, 1947.

[61] Sugar Industry (Reorganisation) Act, 1936, s. 23 (2). Air Navigation Act, 1936, s. 27 (2). Cinematograph Films Act, 1938, s. 34 (2). Bacon Industry Act, 1938, s. 48 (2).

companies formed *ad hoc*. By the London Passenger Transport (Agreement) Act, 1935,[62] and the Railways (Agreement) Act, 1935,[63] the Treasury was authorised to guarantee the securities to be issued by these finance companies. The contracts between the Treasury and the undertakers and companies concerned are scheduled to these statutes, and contain the fair wages and conditions clause in its 1909 form,[64] without any reference to proceedings before the Industrial Court, but with a number of significant additions. It has been a common experience that social standards cannot be enforced unless their beneficiaries are made acquainted with their rights. It is all very well for the lawyer to insist that *jura vigilantibus scripta sunt* : the builder's labourer or the apprentice in a workshop may be as 'wide awake' as you wish to have him, but he cannot be expected to know about fair wages clauses or similar measures designed to protect him, unless they have received a high degree of publicity on the building site or in the workshop, and the law has ensured this publicity. British social legislation—minimum wage laws, factory laws, Truck Acts, etc.[65]—has for many years compelled the employers to exhibit notices informing the workers of their rights, and, in a number of instances compliance with this duty has become a condition for the exercise of certain rights by the employer himself.[66] Enhanced publicity for the law has been the battle-cry of all law reformers from Gnaeus Flavius to Bentham : provisions for 'workshop publicity' of social legislation helps to break up the monopoly of legal knowledge. During the inter-war period this policy was extended to the fair wages and conditions clauses, and, in the contracts scheduled to the London Passenger Transport and Railway Agreements Acts of 1935 we find that the transport undertakers and railway companies promise to 'take all reasonable steps . . . for the exhibition of notices at the works of all contractors and sub-contractors regarding fair wages for the information of workpeople'.[67]

This provision was destined to become common form and, as will be further mentioned below, has now been incorporated in the latest version of the general fair wages resolution. There are, however, in the transport agreement statutes of 1935, one or two further variations from the general pattern of the 1909 resolution which

[62] 25 & 26 Geo. 5, c. 27.
[63] 26 Geo. 5, c. 6.
[64] Clause 19 (*b*), (*c*) of the Agreement scheduled to the London Passenger Transport (Agreement) Act. Clause 16 (*b*), (*c*) of the Agreement scheduled to the Railways (Agreement) Act.
[65] *E.g.*, Wages Councils Act, 1945, s. 15; Factories Act, 1937, s. 114; Truck Act, 1896, s. 1 (1) (*a*).
[66] *E.g.*, under the Truck Act, 1896.
[67] This is in accordance with Recommendation 2 of the Fair Wages Advisory Committee which goes further in that it demands publicity for collective agreements in the workshops. (See Milne-Bailey, *Trade Union Documents*, p. 383.)

deserve attention. Since the contract embodying the obligation to enforce fair conditions was made between the Treasury and the transport undertakers, the 'contractors' themselves were not parties to it. Only in exceptional cases would the electrification and other projects be carried into effect by 'direct labour', *i.e.*, by the transport undertakings themselves. In view of the strength of the unions vis-à-vis these undertakings and the prevalence of collective agreements [68] and awards by the Industrial Court [69] the fair wages clause appears in relation to such 'direct labour' in the unusual, but, in the circumstances, adequate form that 'the wages and other conditions of employment . . . shall be those in force in the Undertaker's (Company's) service on similar work'.[70] As a rule, the railway companies and transport undertakers would enter into transactions with contractors, and the contractors in their turn would use the assistance of sub-contractors. Hence the obligation imposed by the Treasury upon the railway companies, etc., to 'take all reasonable steps to ensure the observance of the terms of this clause by all contractors and sub-contractors' involved an extension of the clause's binding effect from the 'second' to the 'third' stage. This interposition of the transport undertakers between the Government and the contractors made it possible to provide 'for the inspection of wage books in order to see that the terms of this clause have been properly adhered to',[71] and thus to enlist the administrative machinery of the railway companies, etc., for the enforcement of the fair standards. One may call this a rudimentary analogy to public inspection by Government officers—the 'administrative sanction' which has done so much to translate the postulates of minimum wage laws into reality.[72]

O. KAHN-FREUND.

(*To be concluded.*)

[68] See s. 62 *seq.* of the Railways Act, 1921.
[69] Especially the famous decision No. 728 on Railway Shopmen (Official Collection, Vol. 4, p. 70).
[70] See Clauses 19 (*c*) and 16 (*c*) respectively.
[71] This is in accordance with Recommendation 3 of the Advisory Committee. See above, note 67.
[72] *E.g.*, Wages Councils Act, 1945, s. 17.

INTERNATIONAL CRIMINAL LAW —FACTS AND ILLUSIONS

If one disregards as purely political in nature the example set by the exile of Napoleon Buonaparte [1] one may state that the first significant attempts were made at the end of the first World War to create individual criminal responsibility under international law for political offences and other acts of State [2] such as, for instance, the resort to war or the violation of international obligations. The French Government then tried, on the basis of a *Memorandum* written by two eminent jurists [3] to legally justify the proposed trial of ex-Kaiser William II accused of having resorted to illegal war. The Preliminary Peace Conference favourably considered such a trial and decided on January 25, 1919, to create ' for the purpose of inquiring into the responsibilities relating to the war ' an interallied commission composed of ten members of the Great Powers and five others ' elected from among the Powers with special interests '.[4] The report [5] presented by this Commission to the Preliminary Peace Conference accepted many features originally contained in the French *Memorandum*. With regard to the question of individual criminal responsibility for ' offences against the laws and customs of war or the laws of humanity ' [6] the Commission stated expressly that ' in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of State '.[7] To be sure, the report was careful in pointing out that such a tribunal could only be established ' with

[1] H. H. Bellot, ' The detention of Napoleon Buonaparte ', in *The Law Quarterly Review*, Vol. 39 (1923), p. 171 ff.

[2] It is to be noted that international law, as an exception to the rule, has established individual criminal responsibility for piracy *juris gentium*, as well as for war treason and espionage even if the latter constitute acts of the State.

[3] F. Larnaude and A. de Lapradelle, ' Examen de la responsabilité pénale de l'empereur Guillaume II d'Allemagne ', in *Journal du droit International*, Vol. 46 (1919), pp. 131–159.

Attention should be called to an interesting proposal of an English writer suggesting the establishment of ' the Hague Court of Criminal Appeal ' for the trial of war criminals and the creation, in the course of a codification of an international criminal law, of ' the social sanction of *infamia* ' carrying with it the loss of citizenship. (H. H. Bellot, *War Crimes: Their Prevention and Punishment*, Grotius Society (London, 1917), Vol. 2, pp. 31–55.)

[4] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. Report presented to the Preliminary Peace Conference, March 29, 1919, in *The American Journal of International Law*, Vol. 14 (1920), p. 95.

[5] *Ibid.*, pp. 95–126.

[6] *Ibid.*, p. 117.

[7] *Ibid.*, p. 116.

the consent of that State itself secured by articles in the Treaty of Peace'.[8] As concerns the 'premeditation' of the resort to a 'war of aggression',[9] or the violation of the neutrality of Belgium and Luxemburg, the Commission recommended that *for the future* 'penal sanctions should be proposed for such grave outrages against the elementary principles of international law'.[10] However, the report emphasised that 'a war of aggression may not be considered as an act directly contrary to positive law'[11] and that 'no criminal charge can be made against the responsible authorities or individuals (and notably the ex-Kaiser) on the special head of these breaches of neutrality'.[12] In view of the leading role recently assumed by the United States Government in the prosecution of Nazi war criminals for the same offences, it is interesting to note that the American members of the Commission created in 1919 not only were in substantial accord with this rejection of legal responsibility for resort to aggressive war but went even further by declaring that they were unable to agree with the report of the Commission 'in so far as it subjects to criminal, and therefore, to legal prosecution, persons accused of offences against "the laws of humanity", and in so far as it subjects chiefs of States to a degree of responsibility hitherto unknown to municipal or international law'.[13] It was particularly emphasised that 'the laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law'.[14] Although admitting that war is by its very nature inhuman the American representatives pointed out that 'a judicial tribunal only deals with existing law . . . leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity'.[15] While recognising that offences against the laws and customs of war might be tried before national courts, the American members of the Commission at this time 'felt very strongly that too great attention could not be devoted to the creation of an international criminal court for the trial of individuals, for which a precedent is lacking, and which appears to be unknown in the practice of nations'.[16] In spite of these American objections[17] the main features of the report were incorporated into the penal clauses of the Treaty of Versailles although the ex-Kaiser, perhaps not only on account of difficulties in the way of his extradition, was never tried for the

[8] *Ibid.*
[9] *Ibid.*, p. 118.
[10] *Ibid.*, p. 120.
[11] *Ibid.*, p. 118.
[12] *Ibid.*, p. 120.
[13] *Ibid.*, p. 135.
[14] *Ibid.*, p. 134.
[15] *Ibid.*, p. 144.
[16] *Ibid.*, p. 145.
[17] For the Japanese objections see *ibid.*, pp. 151–152.

alleged commission of a 'supreme offence against international morality and the sanctity of treaties'.[18]

Not discouraged by the failure to carry out the relevant provisions of the Treaty of Versailles, an important attempt to create international penal responsibility for political acts of state officials was made by the Advisory Committee of Jurists which convened in February, 1920, at London in order to prepare plans for the establishment of the Permanent Court of International Justice.[19] The original draft before this Committee suggested the constitution of a 'High Court, placed at the summit of International Justice and called upon to take cognisance of crimes committed against international good order and the universal law of nations'.[20] Since this draft met with stern opposition from leading members of the Committee [21] it was amended and separated from the proposed Statute of the Permanent Court of International Justice. In its final form, as recommended to the League of Nations, the draft provided that 'the High Court of International Justice shall be competent to try crimes constituting a breach of international public order or against the universal law of nations, referred to it by the Assembly or by the Council of the League of Nations'.[22] The Assembly of the League of Nations, on December 17, 1920, rejected the recommendations of the Committee of Jurists by declaring that 'There is not yet any international penal law recognised by all nations, and that, if it were possible to refer certain crimes to any jurisdiction, it would be more practical to establish a special chamber in the Court of International Justice'.[23] The failure of the Committee of Jurists, it appears, precluded any favourable consideration of similar proposals for the creation of an international court with jurisdiction over individuals for crimes such as the resort to aggressive war or the violation of international obligations. It is true that the League of Nations on November 16, 1937, recommended to its members in connection with a draft-convention for the 'prevention and punishment of terrorism' [24] the acceptance of a 'Convention for the creation of an International Criminal Court'.[25] However, these draft-conventions did not contain

[18] For the penal clauses of the Treaty of Versailles see Carnegie Endowment for International Peace, *The Treaties of Peace*, 1919–1923 (New York, 1924), Vol. 1, pp. 121–122. For the objections of the German Government to Chap. 7 of the Treaty of Versailles see H. W. Temperley, *A History of the Peace Conference of Paris* (London, 1920–1924), Vol. 2, pp. 304–306.

[19] For the complete official report, see Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee . . .* (The Hague, 1920).

[20] *Ibid.*, p. 111.

[21] *Ibid.*, pp. 498–516.

[22] *Ibid.*, p. 748.

[23] League of Nations, Assembly, *Document* No. 249 (20/48/249), December 17, 1920, III Committee, Permanent Court of International Justice, *Voeux* submitted by the Advisory Committee of Jurists at the Hague, pp. 278–279.

[24] League of Nations. *League of Nations Publications*, Vol. 1, Legal, 1937 Committee for the International Repression of Terrorism, Report, p. 2.

[25] *Ibid.*

any stipulations establishing individual penal responsibility for resort to illegal war or the violation of international treaties. While proposing the jurisdiction of an international criminal court under exceptional circumstances for the trial of a highly limited number of cases neither one of these draft-conventions was ratified by a single State. In addition to these unsuccessful official attempts the problems appertaining to the creation of an international criminal law, apart from individual contributions, were also considered by professional groups such as the International Law Association,[26] the Association Internationale de Droit Pénal,[27] the Interparliamentary Union [28] and the American Society of International Law.[29] The various suggestions made in the course of years by these organisations were not accepted by any government, nor did they exert any effective influence on the League of Nations, or on regional groups of States. None of the various non-aggression treaties concluded in the period between the two World Wars permits the interpretation that the perpetrators of an ' aggressive ' war may be exposed to criminal prosecution. Nor is it possible to attach any significance in this respect to the many declarations, resolutions and draft-conventions which, although declaring ' aggressive war ' an ' international crime ' never became legally binding upon any State.[30] Perhaps the most important among the non-aggression treaties designed to re-affirm the *bellum justum* theory [31] is the General Pact for the Renunciation of War signed at Paris on August 27, 1928. The latter, however, failed to establish, even by implication, the principle that resort to war in violation of the Pact is a crime or that individuals can be held legally responsible for its violation. Far from creating an international criminal law the Pact of Paris was not even intended to provide for penal sanctions

[26] H. H. Bellot, ' A permanent international criminal court ', in International Law Association, *Report of the 31st Conference held at Buenos Aires, August*, 1922 (London, 1923), pp. 63–86.
See also International Law Association, *Report of the 33rd Conference* (London, 1925), pp. 75–111, and particularly International Law Association, *Report of the 34th Conference held at Vienna, August*, 1926 (London, 1927), ' The permanent international criminal court ', pp. 106–225.

[27] *Revue Internationale de droit public*, Vol. 3 (Paris, 1926), pp. 150–467. For the draft-statute of a ' chambre criminelle ' at the Permanent Court of International Justice see *Revue Internationale de droit public*, 1928, pp. 293-307.

[28] Union Interparlementaire, *Compte rendu de la XXII Conférence* (Berne, 1924), pp. 328–335; Interparliamentary Union, XXIII Conference, Washington-Ottawa: 1925, *Preliminary Documents*, II, p. 72 ff.; Interparliamentary Union, *Bulletin*, 1926, p. 105; Interparliamentary Union, *Bulletin*, 1930, p. 202; Interparliamentary Union, *Bulletin*, 1931, p. 369; Interparliamentary Union, *Compte rendu de la XXVIII Conférence* (Genève, 1932), p. 181 ff.

[29] American Society of International Law, *Proceedings, April*, 1921, pp. 62–69; and the same, 1922, pp. 69–71.

[30] For an enumeration of these declarations, resolutions, and draft-conventions see Leo Gross, ' The criminality of aggressive War ', in *The American Political Science Review*, Vol. 41 (April, 1947), pp. 205–225.

[31] Hans Kelsen, *General Theory of Law and State* (Cambridge, Mass., 1945), pp. 331–341.

against an alleged aggressor State.[32] The efficacy of the Pact, as stated officially a short while after its conclusion, 'depends solely upon the public opinion of the world and upon the conscience of those nations who sign it'.[33] Moreover, it is pertinent to record the then prevailing British interpretation of the legal meaning of the Pact (as well as of the so-called 'compulsory' jurisdiction clause of the Permanent Court of International Justice) according to which 'the effect of these instruments, taken together, is to deprive nations of the right to employ war as an instrument of national policy, and to forbid States which have signed them to give *aid or comfort to an offender*. As between such States, there has been in consequence a fundamental change in the whole question of belligerent and neutral rights'.[34] The fact that the United States Neutrality Acts[35] did not provide for discriminatory treatment of States accused of violations of the Pact of Paris proves that the United States, as well as a good number of other countries, was not even prepared to accept the British interpretation of the Pact by denying its violators the benefits resulting from the indiscriminatory use of neutral rights. It appears necessary to emphasise these commonly known facts since the latest attempt to establish an international criminal law by means of the London Agreement of August 8, 1945,[36] the Charter of the International Military Tribunal attached thereto,[37] and the trial[38] and conviction[39] of German war criminals at Nuremberg[40] relies greatly on a different

[32] H. Lauterpacht, 'The Pact of Paris and the Budapest Articles of Interpretation' in *Transactions of the Grotius Society*, Vol. 20 (1935), pp. 178–202.

[33] Statement of Henry L. Stimson, U.S. Secretary of State, released on December 30, 1929, in *The American Journal of International Law*, Supplement, Vol. 25 (1931), pp. 89–90.

[34] H.M. Stationery Office, Misc. No. 12 (1929), Cmd. 3452. Italics supplied.

[35] Act of August 31, 1935, 49 United States Statutes at Large, Pt. 1, p. 1081; Act of May 1, 1937, 50 United States Statutes at Large, Pt. 1, p. 121; Act of November 4, 1939, 54 United States Statutes at Large, Pt. 1, p. 4.

[36] For the text of the London Agreement see *Trial of War Criminals, Documents*, U.S. Department of State Publication 2420, Washington, 1945, pp. 13–15.

[37] For the text of the Charter of the International Military Tribunal see *ibid.*, pp. 15–21.

[38] For the proceedings of the International Military Tribunal see the as yet incomplete set of *The Trial of German Major War Criminals*, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, H.M. Stationery Office (London, 1946–1947). Hereinafter quoted as 'Proceedings'.

[39] For the verdict of the International Military Tribunal see *Judgment of the International Military Tribunal for the Trial of German Major War Criminals* (with the dissenting opinion of the Soviet Member), Nuremberg, September 30, October 1, 1946, Misc. No. 12 (1946), Cmd. 6964, H.M. Stationery Office, London, 1946. Hereinafter quoted as 'Judgment'.

[40] For the legal doctrines advanced by the Allied prosecution during the Nuremberg proceedings see also:

(a) *The Trial of German Major War Criminals . . . Opening Speeches of the Chief Prosecutors . . .* H.M. Stationery Office, London, 1946. Hereinafter quoted as 'Opening Speeches'.

(b) *The Trial of German Major War Criminals . . . Speeches of the Chief Prosecutors . . . at the close of the case against the individual defendants,*

interpretation of the Pact of Paris. It is pertinent to note that the opening speeches of the Allied prosecution already reflect the conception that the Pact rendered resort to aggressive war a criminal offence for which its perpetrators could be held individually responsible.[41] This view, again, is emphasised in the closing speeches of the prosecution rejecting the argument of counsel for the defence that the Pact of Paris ceased to be law since 'the entire system of prohibition of war had collapsed before the outbreak of the Second World War'.[42] At the same time an attempt was made to examine the fundamental question, arising especially with regard to the Pact of Paris, namely whether reservations attached to a treaty with reference to the right of self-defence destroy the capacity of such a treaty to create legal obligations. The British prosecution answered this question in the negative, asserting an affirmative answer would mean 'that every prohibition or limitation of the right of war is a nullity if it expressly provides for the right of self-defence'.[43] The latter, it was admitted, means that a State 'in the first instance' has the right to decide whether there is danger in delay and whether immediate action to defend itself is imperative. But, so continues the argument of the prosecution, the State 'acts at its peril' since the State is 'answerable if it abuses its discretion, if it transforms "self-defence" into an instrument of conquest and lawlessness. . . .'.[44] Although it was asserted that the ultimate decision as to the lawfulness of action claimed to be taken in self-defence does not lie with the State concerned, the Allied prosecution did not say to whom a State is 'answerable' for such action. In the absence of any legal obligation to submit this question to an impartial authority, and in the absence of any international agency or court with compulsory jurisdiction competent to decide whether

H.M. Stationery Office, London, 1946. Hereinafter quoted as 'Closing Speeches'.

(c) *The Trial of German Major War Criminals . . . Speeches of the Prosecutors . . . at the close of the case against the indicted Organisations*, H.M. Stationery Office, London, 1946.

[41] Justice Robert H. Jackson, in Opening Speeches, *op. cit.*, p. 39, declared: 'The very minimum legal consequences of the treaties making aggressive war illegal is to strip those who incite or wage them of every defence the law ever gave, and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes'.

See also Sir Hartley Shawcross, *ibid.*, p. 56: 'Thus, there is no doubt that by the time the National-Socialist State of Germany had embarked upon the preparation of the war of aggression against the civilised world, and by the time it had accomplished that design, aggressive war had become, in virtue of the Pact of Paris and other treaties and declarations to which I have referred, illegal and a crime beyond all uncertainty and doubt'.

See also M. François de Menthon, *ibid.*, p. 104, who, after referring extensively to the Pact of Paris declared: 'Since 1928 the international law of war has emerged from its framework of regulations. It has gone beyond the empiricism of the Hague Convention to qualify the legal foundation of recourse to force. Every war of aggression is illegal, and the men who bear the responsibility for bringing it about place themselves by their own will beyond the law'.

[42] Sir Hartley Shawcross, in Closing Speeches, *op. cit.*, p. 53.

[43] *Ibid.*, p. 55.

[44] Closing Speeches, *op. cit.*, p. 56.

the right of self-defence may be invoked, the interpretation advanced by the Allied prosecution, in fact, amounts to the admission that it is the right of the victor to decide whether or not the vanquished resorted to war in self-defence; or can anyone expect that the vanquished would be permitted to sit in judgment over the victor? If, however, an international court or supra-national organ is not empowered to pass judgment on this vital question, and if for this reason the decision is left to the governments of the States in conflict, it would seem legally impossible to distinguish between a 'just' war and an illegal war or to attribute to the provisions of the Pact of Paris more than moral significance. Since the prosecution supported its arguments by reference to the Covenant of the League of Nations and to Article 51 of the Charter of the United Nations it might, perhaps, be stated that neither may be construed as having constituted legally binding obligations on Germany with regard to her acts allegedly committed in self-defence at the outbreak of and during the second World War. Moreover, the *ex post facto* analogy invoked by the prosecution that Article 51 of the Charter of the United Nations 'leaves to the Security Council the power of ultimate action and determination' [45] does not apply to disputes or situations involving States with permanent seats on the Security Council. Even as far as smaller States are concerned the Security Council's 'power of ultimate determination' is qualified by the provisions of Article 27, section 3, just as the Security Council's 'power of ultimate action' is rendered nugatory, at least at the present time, by the lack of special agreements which, in accordance with Article 43, are the prerequisite for any enforcement action of the Security Council. In view of these considerations it appears difficult, indeed, to square with the existing rules of international law the construction placed in the judgment of the International Military Tribunal on the Pact of Paris, a construction according to which a war in violation of the Pact 'is illegal in international law; and those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing'.[46] Nor would it seem possible to find in the 'international history' [47] which preceded the Pact any evidence in support of this novel conception.[48]

[45] *Ibid.* [46] Judgment, *op. cit.*, p. 39. [47] *Ibid.*, p. 40.

[48] As stated by an American authority on international law 'the judges of the Tribunal, in characterising "aggressive" war as a crime, were each condemning the history of their own nation'. (Edwin Borchard, 'International Law and International Organisation', in *The American Journal of International Law*, Vol. 41 (January, 1947), p. 107, note. See also George A. Finch, 'The Nuremberg Trial and International Law', *ibid.*, p. 33, where the prominent author arrives at the conclusion that it is 'impossible to accept the thesis of the Nuremberg Tribunal that a war in violation of the Pact was illegal in international law on September 1, 1939, and that those who planned and engaged in it were guilty of international criminal acts at the time they were committed, or at the date of signature of the Charter of the International Military Tribunal at London on August 8, 1945, or on October 1, 1946, the date of the judgment of the Nuremberg Tribunal'.

The creation of personal responsibility under international law for 'crimes against peace' as defined in the Charter of the International Military Tribunal, and for other violations of international obligations, presupposes not only the existence of a permanent international criminal court with compulsory jurisdiction over individuals but also of a supra-national organ with power to execute effectively the verdicts of such a court. At present, neither of these stipulations has been fulfilled. The London Agreement establishing the International Military Tribunal provided especially in Article 7 for the right of any signatory to give, after the period of one year during which it was to remain in force, 'one month's notice of intention to terminate it'. The fact that the prosecuting Powers have agreed to try other Axis nationals before their municipal courts is ample evidence that the International Military Tribunal has ceased to function. Moreover, it ought to be observed that the latter did not have the character of a truly international court since its legal basis had been created by a unilateral act of the four prosecuting Powers without the consent of Germany.[49] As regards nationals of the victorious Powers the International Military Tribunal never had jurisdiction over them since Article 1 of its Charter expressly stipulates that the International Military Tribunal shall be established 'for the just and prompt trial and punishment of the major war criminals of the European Axis'. As far as German nationals are concerned it is pertinent to note that the prosecuting Powers found it necessary to give, by means of a legislative act, namely, Control Council Law No. 10, retroactive effect to the provisions of the London Agreement and the Charter of the International Military Tribunal.[50] It is, therefore, Control Council Law No. 10, and not the London Agreement, which must be considered the legal basis for the Nuremberg trial. No doubt exists that the Control Council at Berlin was competent to proclaim such a law since the Allied Powers, on the basis of the Potsdam Declaration,[51] had assumed 'supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any State, municipal, or local government or authority', and since, according to a declaration issued on the same day, this supreme authority over Germany was to be 'exercised, on instructions from their Governments, by the Soviet, British, United States, and French Commanders-in-Chief, each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole'.[52] These four Commanders-in-Chief 'together constitute the

[49] F. B. Schick, 'War Criminals and the Law of the United Nations', in *The University of Toronto Law Journal* (Lent Term, 1947), pp. 30–32.
[50] For the text of Control Council Law, No. 10, see *The Department of State Bulletin*, Vol. 15 (November 10, 1946), p. 862.
[51] For the text of the Potsdam Declaration, see *The Department of State Bulletin*, June 10, 1945, p. 1051.
[52] *Ibid.*, p. 1054.

Control Council '[53] in which, therefore, is vested supreme legislative, executive and judicial power over Germany.[54] The international significance of the Nuremberg trial, however, lies not in the fact that the victorious nations, by proclaiming Control Council Law No. 10, succeeded belatedly in establishing the legal basis for the prosecution of German major war criminals, but in the supreme effort of the prosecuting governments to create, by means of the Nuremberg trial, an international criminal law destined to have deterrent effects on potential aggressors of the future. Thus, the chief prosecutor for the United States stated in his opening speech that 'while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment. . . . This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of State to attack the foundations of the world's peace, and to commit aggressions against the rights of their neighbours. . . . Personal punishment, to be suffered only in the event the war is lost, will probably not be a sufficient deterrent to prevent a war where the war-makers feel the chances of defeat to be negligible. But the ultimate step in avoiding periodic wars . . . is to make statesmen responsible to law'.[55] This view was implemented by the chief prosecutor for the United Kingdom, in whose opinion 'the nations of the world had . . . sought to make aggressive war an international crime, and although previous tradition has sought to punish States rather than individuals, it is both logical and right that, if the act of waging war is itself an offence against international law, those individuals who shared personal responsibility for bringing such wars about should answer personally for the course into which they led their States. . . .' Hence the view of the British Government was expressed 'that in these matters this Tribunal will apply to individuals not the law of the victor, but the accepted principles of international usage, in a way which will, if anything can, promote and fortify the rule of international law and safeguard the future peace and security of this war-stricken world'.[56] The same idea, again, found expression when the President of the United States, in his opening address before the General Assembly of the United Nations on October 23, 1946, declared that 'twenty-three members of the United Nations have bound themselves by the Charter of the Nuremberg Tribunal to the principle that planning, initiating, or waging a war of aggression is a crime against humanity for which

[53] *Ibid.*

[54] H. Kelsen, 'The Legal Status of Germany according to the Declaration of Berlin', in 39 *American Journal of International Law* (1945), p. 518.

[55] Mr. Justice Jackson, 'Summary Review of the Indictment and the Charter and their Legal Foundations', in Proceedings, *op. cit.*, Part 1, p. 85.

[56] Sir Hartley Shawcross, Opening Speech, in Proceedings, *op. cit.*, Part 2, p. 46.

individuals as well as States shall be tried before the bar of international justice '.[57]

It is questionable whether an international criminal law as proposed by the Charter of the International Military Tribunal, even if it were accepted by substantially all independent States, would have a deterrent effect on those actually in a position to lead their nations into war. One should not forget, in this connection, that wars are planned and commenced in the hope of victory, and not in fear of possible defeat.[58] As long as the schemes for effective world government remain modern Utopias, the idea of successfully restraining potential war leaders by attaching criminal sanctions to predominantly political acts must be considered as illusory.

Apart from the aforementioned practical considerations it may readily be observed that great technical difficulties are to be overcome if a new international criminal law such as envisaged at Nuremberg is to be put into effect. It is, for instance, an elementary principle of modern criminal law that a *legal* sanction shall be applied only if its conditioning fact, namely the violation of a clearly defined and previously stipulated legal obligation has been established by a competent authority. If these prerequisites are not fulfilled sanctions, no matter how loudly acclaimed by popular opinion, have no strictly legal character but must be considered as *political* enforcement measures. To take a concrete example by referring again to the Nuremberg trial, the Allied prosecution, quite consistently, it would seem, stated that ' the heart of the case ' against the Nuremberg defendants was the ' aggressive war phase ', that ' Crimes against Humanity . . . would have had little juridical international significance except for the fact that they were the preparation for the commission of aggression . . .', and that ' even the aspects of the case involving War Crimes in the strict sense are aspects which are merely the inevitable, proximate result of wars of aggression . . .'.[59] Hence, if a new international criminal law is to be created in accordance with the avowed intentions of the victorious Powers it would be necessary to define, as a preliminary step, the meaning of the term ' aggressive war ' and to include in this somewhat ambitious undertaking definitions of other acts enumerated in the Charter of the International Military Tribunal under the group of ' Crimes against Peace ' such as the *planning*, *preparation*, or *initiation* of a *war of aggression*, or the *participation in a common plan or conspiracy*

[57] *Journal of the United Nations*, No. 13: Supp. A–A/P.V/34, p. 8.

[58] For a further elaboration of this idea, see this writer's article ' The Nuremberg Trial and the International Law of the Future ', in *The American Journal of International Law*, Vol. 41 (October, 1947), pp. 770–799. See also F. B. Schick, ' Crimes against Peace ', in *The Journal of Criminal Law and Criminology* (Northwestern University, School of Law), Vol. 38 (January–February, 1948), pp. 445–465.

[59] Sidney S. Alderman, in Proceedings, *op. cit.*, Part 1, p. 143.

for the accomplishment of any one of the foregoing. It will be observed that the prosecuting Powers were not able to define in a legally conclusive manner the meaning of the term ' aggressive war ', in spite of the references made to various treaties, international committees and commentators.[60] Nor is such a definition given by simply asserting that ' International Law has the power, inherent in its very nature, both to declare that a war is criminal, and to deal with those who aid and abet their States in its commission '.[61] That this problem is wrought with staggering political pitfalls as well as legal difficulties is, perhaps, best illustrated by the fact that the delegates of leading nations, and among them especially the American representatives, refused to accept, at the San Francisco Conference on International Organisation, the inclusion into the Charter of the United Nations of any ' provisions with respect to determination of acts of aggression '.[62] This attitude, it would seem, is not very consistent with the position taken by the very same Powers in the course of the Nuremberg trial. Even more problematical is the attempt of the victorious nations to create other crimes against peace such as the *planning* or *preparation* of an aggressive war, since it is usually impossible to know in advance whether certain activities performed in times of peace by military experts, scientists and industry will, at some later date, lend themselves to the prosecution of an aggressive war. Or would anyone have the slightest doubt that atomic research, the building of improved implements of war, or the intensive experiments with bacteriological weapons, to mention just a few examples, are carried on by the victorious nations for any other but peaceful or defensive purposes? Similar obstacles, obviously, lie in the way of a definition as to what constitutes the *initiation* of an aggressive war. For instance, the original attitude of the victorious Powers taken some twenty years ago with regard to the incorporation of Austria into the German Reich, or the enthusiastic approval by most of these Powers of the cession of the Sudetenland, are evidence, it would seem, that these Powers, when giving diplomatic recognition to these acts, did not, at the time they occurred, consider them as initiative of an aggressive war in spite of the fact that the prosecution of the very same Powers, in the Nuremberg indictment, cited these acts specifically in order to prove that the accused had initiated a war of aggression, and in spite of the fact that the International Military Tribunal in its judgment expressed the same opinion.[63] Finally, a legal definition as to what constitutes a participation in a *common plan* or *conspiracy* to commit ' crimes against peace ', if it could be given at all, would certainly reject the generalisations made, in effect, by

[60] Justice Robert H. Jackson, in Proceedings, *op. cit.*, Part 1, pp. 81–82.
[61] Sir Hartley Shawcross, in Closing Speeches, *op. cit.*, p. 45.
[62] Department of State, *Publication* No. 2349, Conference Series No. 71, p. 91.
[63] Opinion and Judgment, *op. cit.*, pp. 17–22.

the prosecuting Powers that 'any significant participation in the affairs of the Nazi Party or the Government is evidence of a participation in a conspiracy that is in itself criminal'.[64] Obviously, if one were to accept such a construction as the pattern for the international criminal law of the future, any civil servant in any country could become liable to criminal prosecution, since State officials do not, as a rule, resign when their country needs them most, *i.e.*, in times of war; nor would it seem realistic to expect such wholesale resignations even in those rare cases where State officials should not be convinced of the 'justice' of action taken by the government of their country. The recent experiences with German and other Axis officials, finally, demonstrate quite clearly that not all civil servants, even if they should be opposed to the political doctrines and actions of their government, are potential martyrs willing to forego the income on which they depend, or to face criminal sanctions and, perhaps, death. In view of these considerations it is fortunate that the International Military Tribunal rejected the extensive interpretation of the prosecuting Powers by declaring in its dictum that 'the conspiracy must be clearly outlined in its criminal purpose . . . [and] must not be too far removed from the time of decision and of action'.[65]

As already indicated the Members of the United Nations have clearly demonstrated that they are not willing to accept as legally binding in their relations with each other the principal theories proclaimed at Nuremberg. Neither the Charter of the United Nations nor the Statute of the International Court of Justice contains any provisions establishing individual criminal responsibility. It is even doubtful whether the law of the United Nations provides for collective sanctions in the legal meaning of this term. To be sure, such an interpretation would be possible only if the theory were accepted that the Security Council is competent to declare any act or omission a 'threat to the peace, breach of the peace, or act of aggression' and, accordingly, to decide on the basis of Article 39, upon the use of the enforcement measures provided under the Charter by Articles 41, 42, and 45.[66] Even then, the States with permanent seats on the Security Council would be excluded from the application of collective sanctions, since it is obvious that no government will vote for enforcement measures against its own country.

It has been suggested that the first step in the development of the concept of an international criminal law should be the creation of effective sanctions for acts called 'Crimes against Humanity' in the Charter of the International Military Tribunal.[67] If the legal

[64] *Ibid.*, p. 43.
[65] *Ibid.*, p. 43.
[66] F. B. Schick, 'Law or Politics for the Maintenance of Peace', in *The Juridical Review*, April, 1947, pp. 1–20.
[67] Max Radin, 'International Crimes', in *Iowa Law Review*, Vol. 32 (November, 1946), pp. 42–50.

meaning given by the International Military Tribunal to this newly created term is correct, the acts relied upon, unless they are war crimes *stricto sensu*, must have been committed ' in execution of, or in connection with, the aggressive war . . .' in order to constitute ' crimes against humanity '.[68] Hence, if one cannot—for the reasons previously stated—expect agreement of the Community of Nations as to what constitutes a war of aggression, it will be impossible to define in a legally exact manner the meaning of ' crimes against humanity ' since the latter, admittedly, can be committed only in execution of, or in connection with, ' aggressive war '. The assertion, however, is made that there exists already an ' international penal law which recognises that certain harmful acts should be generally punishable '.[69] Hence, the belief is expressed that a ' penal code of substance and procedure ' would ' easily find general acceptance among most of the civilised nations of the world because in essence it is already accepted by them '.[70] The conclusion, therefore, is drawn that the ' unorganised but real international community has independently of formal international relations, already condemned and treated as punishable ' [71] acts such as enumerated in the Charter of the International Military Tribunal as ' crimes against humanity ' [72] and especially the persecution of racial and religious minorities.

One may very well wonder whether States are ready to accept an international criminal law permitting not only ' international intervention that seeks to check any governmental policy anywhere in the world which organises or permits the persecution of minorities ' [73] but providing in addition for ' the establishment of criminal responsibility on the part of those individuals to whose activity the persecution of minorities can be properly charged ',[74] as well as for ' the prosecution of international criminals of this class '. It would seem that the attitude of the principal States expressed in Article 2, section 7, of the United Nations Charter with regard to intervention in matters which are essentially within their domestic jurisdiction is not propitious to the creation of the aforementioned crimes against humanity.

A somewhat different approach toward the creation of an international criminal law has been chosen by a group of writers who, while not denying the novelty of certain principles proclaimed at Nuremberg, rely in their legal analysis primarily on municipal law analogies. Imbued with some historical knowledge pertaining to the development of common law these experts, it would seem, believe that a ' legal precedent ', now, has been established even though the

[68] Opinion and Judgment, *op. cit.*, p. 65.
[69] Max Radin, *op. cit.*, p. 41.
[70] *Ibid.*, p. 40.
[71] *Ibid.*
[72] *Ibid.*, p. 49.
[73] *Ibid.*
[74] *Ibid.*, p. 48.

previously existing norms of positive international law may have been insufficient for the trial of criminal offences as created under Chapter II of the Charter of the International Military Tribunal. Hence, the doctrine is advanced that it will be possible and legally permissible to refer in the future to the Nuremberg Trial as declaratory of a valid rule of international common law. This, in turn, means—so runs the argument—that a new international criminal law has come into being by way of the Nuremberg Trial. It is stated that this development follows closely the pattern of growth of the common law where courts every so often found it necessary to pronounce, for the first time, that the commission of an act (or its omission) was a crime, thus creating case-law or, as it is called, judge-made law.[75] It would be difficult to accept such theories as regards the creation of a general international criminal law by the States responsible for the London Agreement and the Charter of the International Military Tribunal. The latter, certainly, has not established rules which might be considered as declaratory of a general practice accepted as law or as an expression of general principles of law recognised by civilised nations. Too many—and among them are not only the vanquished—have rejected all or some of the legal innovations inaugurated at Nuremberg. It is, however, conceivable that the victors in future wars will apply similar principles to the prosecution and punishment of their opponents and that, in the course of time, the trial of individuals for 'crimes against peace', newly formulated 'war crimes', or 'crimes against humanity', will develop into an international usage or custom. After all, *ex injuria jus oritur*. But the International Military Tribunal which, according to the London Agreement of August 8, 1945, had the legal characteristics of an Inter-Allied Municipal Court applying German law retroactively by means of Control Council Proclamation No. 10, was not in a position to create an internationally binding precedent, or a new international criminal law. At present, no international court is in existence competent to apply the provisions incorporated into the Charter of the International Military Tribunal. Moreover, the very fact that the Charter of the International Military Tribunal was to apply only and solely to major war criminals of the

[75] See, for instance, Sheldon Glueck, *War Criminals, Their Prosecution and Punishment*, New York, Alfred A. Knopf, 1944, p. 97, where it is stated that 'Whenever a common law court for the first time held that some act not previously declared by a Legislature to be prohibited was a punishable offence for which the accused was now liable, or whenever, for the first time, it more specifically than theretofore defined the constituents of a crime and applied that definition in a new case, it made law to some extent, despite the fiction that it only "found" or "declared" pre-existing law'. See also Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, New York, Alfred A. Knopf, 1946, pp. 99–100, where the opinion is expressed that 'the Nuremberg trial *will* become a precedent in international law . . . one which establishes that members of Governments, military cliques, industrialists, or others actually in power in a State, who deliberately lead their country into an unjustified, inexcusable, aggressive, and therefore criminal war, may be held personally liable'.

European Axis proves, it would seem, this important legal point beyond any doubt.

The Statute of the International Court of Justice clearly rejects the doctrines of an international criminal law such as was conceived at Nuremberg. It is well known that only States may be parties in cases before this Court, and it is very doubtful, even with regard to States, whether the court's verdicts can be executed effectively.[76] Finally, it is an elementary principle of international law that a treaty creating an international criminal court of the future would be binding only upon its signatories and would have to stipulate anew the law binding upon the court. This, it is to be feared, leaves little legal significance to the ' international common law ' supposedly established by the ' Nuremberg precedent '. It may be noted, in this connection, that the General Assembly of the United Nations on December 11, 1946, unanimously adopted a resolution affirming ' the principles of international law recognised by the Charter of Nürnberg Tribunal and the judgment of the Tribunal ', and directing the Committee on the Codification of International Law ' to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognised in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal '.[77] However, the Committee on the Progressive Development of International Law and its Codification, ' after thorough discussion ', decided ' not to undertake the actual formulation of those principles, which would clearly be a task demanding careful and prolonged study '. Hence, the Committee concluded ' that it was not called upon to discuss the substantial provisions of the Nürnberg principles, and that such discussion would be better entrusted to the International Law Commission '. It is significant that the Committee called attention to the fact that the implementation of the principles proclaimed at Nuremberg, as well as the punishment of other international crimes ' which might be recognised as such by international multipartite conventions, might render desirable the existence of an international judicial authority ' competent to exercise jurisdiction over such crimes.[78] No better success can be recorded with regard to the development of the idea, strongly asserted at Nuremberg, that the denial of the right of existence of entire human groups (genocide) constitutes a crime against humanity. The resolution passed by the General Assembly

[76] F. B. Schick, ' Council and Court of the United Nations ', in *The Modern Law Review*, Vol. 33 (December, 1945), pp. 97–104. See also the author's ' The United Nations' International Court of Justice ', in *The Fortnightly Law Journal* (Toronto), Vol. 15 (November, 1945), pp. 119–122.

[77] United Nations, Department of Public Information, *Yearbook of the United Nations*, 1946–47, Lake Success, 1947, p. 254.

[78] *Ibid.*, p. 260. It is to be noted that such conventions would be binding only on their signatories in spite of the ' precedent ' established by Article 2, section 6 of the Charter of the United Nations.

on December 11, 1946, according to which ' genocide is a crime under international law . . . for the commission of which principals and accomplices—whether private individuals, public officials or statesmen . . . are punishable ',[79] has had no legal effects. It was disposed of by the Committee on the Progressive Development of International Law which ' regretted that, in the absence of information as to the views of the governments, it (the Committee) felt unable at present to express any opinion on the matter '.[80]

Ambitious schemes for international organisation have rarely promoted the cause of international peace. While one may sympathise with the visionary efforts of the victorious Powers to create by means of the Nuremberg trial an international criminal law, it is quite unfortunate that these Powers, by their own actions, have proved their inability, if not unwillingness, to carry out their solemnly declared intentions. That they were bound to fail is not surprising; after all, we must learn to walk before we can attempt to run. Before one may expect the creation of an international criminal law as enunciated at Nuremberg it will first be necessary to accept, and to practise without crippling reservations, the principle of compulsory jurisdiction of an international court or agency over States in all their disputes even though these disputes may be claimed to be political in character.[81] Only then may hope be expressed that the next step in the development of international law can be taken successfully by attaching individual responsibility under international law to the commission of predominantly political acts, such as ' crimes against peace '. At present, plans for an international criminal law which in the final analysis call for an effective international government will only add, it is to be feared, to the already inflated literature on international organisation. They might confirm the conclusions of a prominent American writer who, after having devoted a lifetime to the study and practice of international law, regarded the latter as hardly more than ' a system of global vistas and sterile foregrounds, of vast pretensions and restricted performance, of great age and impressive immaturity, of tempting analogies and factual frustration, of quest for right under the inescapable shadow of recourse to might and of groping for order where disorder is more easily precipitated than restrained '.[82]

F. B. Schick.

[79] *Ibid.*, p. 255.
[80] *Ibid.*, p. 261.
[81] F. B. Schick, ' Council and Court of the United Nations ', in *The Modern Law Review*, Vol. 9 (July, 1946), pp. 97–104.
[82] Edwin D. Dickinson, ' International Law: an Inventory ', in *California Law Review*, Vol. 33 (December, 1945), p. 541.

THE LIMITS OF JUDICIAL REVIEW: STATUTORY DISCRETIONS AND THE DOCTRINE OF ULTRA VIRES

I

LEGAL certainty is always an elusive quarry, but its pursuit is rarely more tantalising than in that field of public law which is concerned with the judicial review of statutory discretions. It would be most desirable for public authorities whose planning schemes and housing programmes may be subjected to serious delays and stultifying restrictions by judicial decisions, as well as for property-owners whose interests may be condemned to extinction, to be able to make confident predictions of the attitude of the courts. Some of the recent cases have helped to clarify the situation; but a neat formulation of the principles governing this 'highly acrobatic part of the law'[1] remains impossible, primarily because of the diversity of its subject-matter, but partly also because of the nebulous terminology employed by the courts.

(1) Each decision turns upon the interpretation of the particular statute conferring the discretionary power, and there is no assurance that a court will be ready to apply to the case in hand principles laid down in a previous decision based on a different statute, even though the material facts appear to be similar.

Again, hard words have been written about the judicial interpretation of collectivist legislation[2] and, although recent cases suggest that the courts will now generally regard such measures with a not unkindly eye, the fundamental antithesis between the mischief rule and the common law presumptions of legislative interest still gives rise to uncertainty. Some judges clearly show a closer attachment than others to the common law presumptions.

Nor has the task of the judge always been facilitated by the draftsman. The language found in statutes has lacked nothing in variety: an Act may empower, or direct, an authority to take specified action, or to take 'reasonable' action of a specified character, when x facts exist; it may authorise the taking of specified action, or such action as the authority concerned thinks fit, when that authority 'is satisfied that it is expedient in the public interest' to do so and when it 'is satisfied' that x facts exist; or it may equivocate, *e.g.*, by substituting the word 'requisite' for 'expedite' in different sub-sections of the same section,[3] or

[1] John Willis in (1940) 53 Harv.L.Rev. at p. 281.

[2] See esp. Sir W. I. Jennings, 'Courts and Administrative Law', (1936) 49 Harv. L.Rev. 426; Willis, 'Statute Interpretation in a Nutshell', (1938) 16 Can.Bar Rev. 1.

[3] See s. 1 of the Town and Country Planning Act, 1944.

by requiring the authority to be 'reasonably satisfied'. Sometimes it has seemed that the purpose of varying the language has been merely 'to improve the graces of the style and to avoid using the same words over and over again'.[4] It must be said, however, that the wording of several of the most recent statutes leaves less room for doubt. By conferring discretionary powers upon Ministers in the most far-reaching terms, Parliament appears to have deliberately discouraged judicial interference.

Even where the discretionary powers are very wide, the possibility of some form of judicial review cannot be ignored unless the Act unambiguously forbids any resort to the courts.[5] But it is often hard to determine whether any existing remedy will enable the improper exercise of a discretion to be effectively challenged. The Act may, of course, point out the remedy by expressly providing for a direct appeal to the courts.[6] Such a provision is, however, unusual. More commonly the ambit of judicial review remains obscure until an aggrieved member of the public invokes the jurisdiction of the courts. He may then go unrewarded for his temerity owing to the limitations of the remedy on which he relies. Thus, whilst certiorari is the appropriate remedy where 'judicial' powers have been exceeded or abused, it will not lie to enable the final determination of the authority entrusted with those powers to be reviewed on its merits, either for insufficiency of evidence or lack of evidence[7]; the declaratory judgment is a discretionary remedy of ill-defined limitations; injunctions and orders of mandamus are not obtainable against the Crown or its agents,[8] and the exact scope of mandamus is in other respects uncertain.

(2) Those functions of public authorities which are not legislative are usually classified as judicial, quasi-judicial and administrative.[9] This classification is unsatisfactory for several reasons.

(a) It is doubtful whether any clear distinction of substance can be drawn between the three functions. The Donoughmore Committee made a serious attempt to formulate definitions which were designed to assist the Legislature to allocate the different types of functions to what the Committee believed to be the most appropriate authorities.[10] However, its critics have shown that its definitions were too obscure to afford any such guidance.[11]

[4] *Per* Blackburn, J., in *Hadley* v. *Perks* (1866), L.R. 1 Q.B. 444 at p. 457.
[5] See, *e.g.*, clause 26 of the British Nationality Bill, 1948 (absolute discretionary powers of the Secretary of State, etc.).
[6] *E.g.*, Housing Act, 1936, s. 15 (appeals to county courts).
[7] *R.* v. *Special Purposes Comrs. of Income Tax* (1881), 21 Q.B.D. 313; *R.* v. *Nat Bell Liquors, Ltd.*, [1922] 2 A.C. 128; *R.* v. *Minister of Health*, [1939] 1 K.B. 232; *R.* v. *Ludlow, ex p. Barnsley Corpn.*, [1947] K.B. 634.
[8] Crown Proceedings Act, 1947, ss. 21, 40 (5).
[9] Administrative functions are often called 'executive'.
[10] Report of the Committee on Ministers' Powers, Cmd. 4060/1932, pp. 73 ff.
[11] Jennings, 'The Report on Ministers' Powers', (1932) 10 Public Administration 333 and *The Law and the Constitution*, 3rd ed., Appendix I; W. A. Robson, *Justice and Administrative Law*, 2nd ed., Chap. 6. See also pp. 309–10, *infra*.

(b) Nevertheless, the courts have persisted in using these terms. The distinctions they have drawn between 'judicial' and 'administrative' functions are of importance, for if they choose to hold that a public authority that is empowered to make decisions affecting private rights is acting in a 'judicial' capacity, certain legal consequences follow. So artificial is the dichotomy of judicial and administrative that the courts have been able to classify a particular function substantially according to their own inclinations. In deciding whether or not a function should be treated as 'judicial', they have plainly been influenced by the practical consequences of calling it 'judicial'.

Thus, when asked to quash the decisions of public authorities by certiorari, the courts, wishing to enlarge their own sphere of jurisdiction, have in the past tended to give the term 'judicial' a wide interpretation.[12] On the other hand, when asked to hold that the proceedings of these authorities enjoy judicial immunity they have been less generous.[13]

In the long line of Housing Act decisions the operation of similar influences can be detected. When a local authority makes a slum clearance order or compulsory purchase order to which objections are lodged by the property-owner, there arises something which superficially resembles a *lis inter partes*. This resemblance is enhanced by the statutory obligation imposed on the Minister of Health to cause a local inquiry to be held and to consider the objections together with the inspector's report on the inquiry before he decides whether or not to confirm the order. Now, the existence of a *lis inter partes* is often regarded as the first element of a 'judicial' function, and if the Minister can be said to act 'judicially' while performing certain of his statutory functions, he must observe the rules of natural justice while so acting. Wishing to protect the property-owner by imposing additional obligations on the Minister, the courts have held that at some stages of his functions the Minister acts 'judicially', so that he will deprive himself of jurisdiction to make the order if at those stages he acts in a manner contrary to natural justice.[14] Since, however, the courts have not felt themselves competent to scrutinise the conduct of the Minister at all stages of his functions, they have said that for certain purposes he acts 'administratively'.

The somewhat blurred line of demarcation between the Minister's two spheres of conduct has shifted during the past

[12] See, *e.g.*, Atkin, L.J., in *R.* v. *Electricity Commissioners*, [1924] 1 K.B. 171 at p. 205; Scrutton, L.J., in *R.* v. *L.C.C.*, [1931] 2 K.B. 215 at pp. 233–4.

[13] *Royal Aquarium* v. *Parkinson*, [1892] 1 Q.B. 431; *Collins* v. *Hy. Whiteway & Co.*, [1927] 2 K.B. 378; *O'Connor* v. *Waldron*, [1935] A.C. 76. See also Willis, 'Three Approaches to Administrative Law', (1935) 1 Toronto L.J. 52 at pp. 62 ff., and J. Finkelman, 'Separation of Powers', (1936) 1 Toronto L.J. 313, for a further discussion.

[14] D. M. Gordon, in (1931) 47 L.Q.R. 386, 557, criticises the 'superstition' that a tribunal has jurisdiction only if it observes the rules of 'natural justice': see also Willis in 53 Harv.L.Rev. at pp. 277–81.

eighteen months. This fact is explained by the growing reluctance of the courts to interfere with a wide statutory discretion conferred upon a Minister responsible to Parliament. Accordingly, the courts now place an increasing emphasis upon the 'essentially administrative' character of the Minister's functions under the Housing Acts.

(c) The indiscriminate use of the expression 'quasi-judicial' is particularly confusing. Popularised by the Donoughmore Committee, it has now firmly established itself in the legal vocabulary,[15] though recent expressions of disfavour by the courts [16] and of ridicule by leading authors [17] may perhaps conduce to its exclusion. Its peculiar attraction lies in the fact that it can be applied to a great variety of functions of public authorities, not to speak of the functions of arbitrators, professional disciplinary bodies and the committees of clubs. Numerous statutes empower Ministers of the Crown (*e.g.*, the Minister of Health under the Housing Acts), statutory boards, local authorities and licensing committees to make decisions based on considerations of public policy after conducting hearings at which evidence is tendered or after considering objections from the interested parties. If it be assumed that there is some material distinction between 'judicial' and 'administrative' functions, then insuperable obstacles stand in the way of any attempt to subsume all these statutory functions under one or other of the two categories, 'judicial' and 'administrative'. These difficulties are conveniently evaded by describing them collectively, in a non-committal fashion, as 'quasi-judicial'. They resemble 'judicial' functions inasmuch as the procedure followed in arriving at the determination is in varying degrees comparable with that followed in contentious litigation before a judge in a court of law. But the final decision of the authority entrusted with the discretion is not (it is said) of a 'judicial' character, 'because it is governed, not by a statutory direction to him to apply the law of the land to the facts and act accordingly, but by a statutory permission to use his discretion after he has ascertained the facts and to be guided by considerations of public policy'.[18] To this extent the function is 'administrative', and is accordingly to be distinguished from a 'purely judicial' function.

This attempt to distinguish a 'judicial' from an 'administrative' *decision* has obvious weaknesses. The decision of a High Court judge in contentious civil litigation is presumably regarded as a 'purely judicial' decision. But, as has often been pointed out, a judge is not a 'legal slot machine' who applies rules of law automatically to new sets of facts. In a case of first impression

[15] Maitland once said: '*Quasi* is one of the few Latin words that English lawyers really love'. (Quoted in H. A. L. Fisher, *F. W. Maitland*, at p. 161.)
[16] As by Lord Greene, M.R., in *B. Johnson & Co. (Builders), Ltd.* v. *Minister of Health*, [1947] 2 All E.R. 395 at p. 400: *v. infra.*
[17] Robson in *Justice and Administrative Law*, 2nd ed. at pp. 401–3 on 'the cult of the quasi'.
[18] Report of the Committee on Ministers' Powers, p. 74.

he may exercise a very wide discretion. In various branches of the law the courts have sought, consciously or unconsciously, to promote in their decisions their own conceptions of the requirements of public policy. Discretions are also conferred upon judges by many statutes, *e.g.*, by divorce legislation, the Rent Restrictions Acts, the recent Law Reform Acts.[19] The attempted distinction fails to recognise the existence of these judicial discretions.

There is another objection to the expression 'quasi-judicial' in some of its applications. The term is used in three distinct senses. It is sometimes used to refer (1) only to the 'judicial' aspects of a so-called quasi-judicial function and sometimes (2) to the totality of the function; while sometimes (3) the final discretionary determination is called a 'quasi-judicial decision'. The second and third uses of the term are especially unsatisfactory. For they tend to suggest that the deliberations and determinations of such authorities should be judged by very much the same criteria as those of an inferior court of law. In particular, the phrase 'quasi-judicial decision' implies that the substance of the final decision is itself susceptible of review by the superior courts.

(d) In several recent cases, which are discussed below, the courts have done something to clarify the law and legal terminology in this respect. They continue to pay homage to the idea that there is a distinction between 'judicial' and 'administrative' functions and that it is possible to disentangle these two elements in statutory functions exercised by Ministers. On the other hand they tend (i) to stress the 'essentially administrative' character of such functions, (ii) to confine the term 'quasi-judicial' to sense (1), or else to eschew it altogether, (iii) to narrow the application of the rules of natural justice, and (iv) in general, to call a function 'administrative' rather than 'judicial' or 'quasi-judicial' whenever they prefer not to subject its exercise to review.

(3) Apart from requiring the rules of natural justice to be observed in the performance of 'judicial' functions, the courts will sometimes review the *substance* of a determination by a public authority. A discretionary power may be absolute (or unqualified), or it may be qualified, and subject to review in a variety of possible forms. It has already been suggested that the problem when the exercise of a discretion will be reviewed, and if so, to what extent, is primarily a study in the interpretation of statutes. But where review does take place the terminology employed is still often ambiguous. Thus, what is meant by saying that an authority must act 'reasonably', or act 'on evidence'?

These several factors preclude facile generalisations, and the remainder of this article does not purport to explore the whole terrain of judicial review. Its object is to discuss some recent cases

[19] *E.g.*, Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (2); Law Reform (Frustrated Contracts) Act, 1943, s. 1; Law Reform (Contributory Negligence) Act, 1945, s. 1 (1).

in the light of (a) their modifications of the traditional rules of natural justice and (b) the difficult question: how far will the courts scrutinise the substance of a decision made in pursuance of a statutory discretion?

II

Where an authority is invested with the power to make decisions affecting private rights, the procedure to be followed is usually prescribed by statute. Failure to comply with these requirements renders the determination ultra vires. Upon these statutory obligations there is superimposed the further duty of observing the rules of natural justice while the authority acts in a 'judicial' capacity. This does not mean that the party aggrieved by the determination can have it set aside by the courts on the grounds that he has been denied an oral hearing, that he does not know who decided the issue, or that he has not been permitted to see an inspector's report on a public inquiry,[20] or (*pace* the Donoughmore Committee) that reasons were not given for the decision. However, the parties to the dispute must be given a 'fair' hearing (*audi alteram partem*), and it is generally asserted that the authority deciding the issue must not be biased.[21]

These principles have undoubtedly served a useful purpose as a means of controlling various types of adjudications otherwise than by way of direct appeal. It is clearly improper for a tribunal to take evidence *in camera* without giving the accused the opportunity to reply; the *audi alteram partem* rule has been infringed.[22] Again, where the members of a tribunal are so circumstanced, by reason of pecuniary interest,[23] or their special relationship to one of the parties,[24] or their previously expressed views on the subject-matter of the dispute,[25] that there is a real likelihood of bias on their part, their decision is quashed, and properly so.

But it is not always possible to impose these standards upon adjudications by public authorities. If Parliament chooses to make a local authority judge in its own cause, the courts must accept the situation.[25a] Similarly, Parliament may exclude the operation of the *audi alteram partem* rule.[26] And the so-called 'quasi-judicial'

[20] *Local Government Board* v. *Arlidge*, [1915] A.C. 120; *Wm. Denby & Sons* v. *Minister of Health*, [1936] 1 K.B. 337.

[21] Inasmuch as a biased hearing is not a 'fair' hearing, the two rules tend to overlap.

[22] *R.* v. *Bodmin JJ., ex p. McEwen*, [1947] K.B. 321.

[23] *Dimes* v. *Grand Junction Canal* (1852), 3 H.L.C. 794.

[24] *R.* v. *Sussex JJ., ex p. McCarthy*, [1924] 1 K.B. 256; *R.* v. *Hendon R.D.C., ex p. Chorley*, [1933] 2 K.B. 696.

[25] *R.* v. *Sunderland JJ.*, [1901] 2 K.B. 357.

[25a] *Wilkinson* v. *Barking Corporation*, [1948] 1 All E.R. 564.

[26] Under the Town and Country Planning Act, 1947, local planning authorities are required to prepare comprehensive development plans and to submit them to the Minister for confirmation. S. 10 (3) of the Act provides that if, *after* objections have been lodged to such a plan, the Minister is of opinion that the local planning authority or any other authority or person ought to be consulted before he comes to his decision, 'he shall consult that authority

duties of the Minister of Health under the Housing Acts are so remote from those of a judge presiding over ordinary litigation that the courts have been constrained to restrict within narrow limits the application of the rules of natural justice to his functions.

The Housing Act Cases [27] :—In a series of cases the courts have reviewed the exercise of his functions by the Minister where he is called upon to decide whether or not to confirm orders made by local authorities. Before objections are lodged, or in the absence of objections, he is said to act ' administratively ', so that no question of conformity with natural justice arises. Thus, he may consult with either party, offer advice on housing problems to the local authority, and may even express tentative approval of the scheme proposed by the authority.[28] Indeed, were the courts to hold otherwise, legislation would be necessary to regularise the present practice whereby the local authority consults the appropriate officers of all the Ministries likely to be affected and obtains a ' clearance ' before submitting any important order for confirmation. An appreciation of the practical difficulties that would result from any attempt to require compliance with the rules of natural justice at this stage of the Minister's functions has doubtless influenced the courts in deciding to regard these functions as ' administrative '.

Once, however, objections are lodged, the ' quasi-*lis* ' is joined and the Minister must act ' judicially ' (or, if the term is preferred, ' quasi-judicially '). He must give both ' parties ' a fair opportunity of presenting their cases,[29] and he must not interview the one behind the other's back [30] on matters specifically related to the confirmation of the order.[31] His ' quasi-judicial ' rôle continues while he considers the objections and the report on the inquiry, but his final decision as to the confirmation of the order is an ' administrative ' act. It has already been indicated that there is no clear distinction of substance between such an ' administrative ' decision and many of the decisions made by the superior judges. The significance of the word ' administrative ' in this connection is that the courts recognise the undesirability of reviewing a decision which may have been founded on overriding considerations of housing policy and on materials to which they have no access, and it is convenient to call such a decision ' administrative '.

or person, but shall not be under any obligation to consult any other authority or person, or to afford any opportunity for further objections or representations or to cause any further local inquiry or other hearing to be held '. This important sub-s. is a clear departure from the *audi alteram partem* rule as it was applied to the functions of the Minister of Health under the Housing Acts in *Errington* v. *Minister of Health*, [1935] 1 K.B. 249: *v. infra.*

[27] For a recent discussion of these cases, see T. A. Blanco White, ' Ministerial Decisions and Natural Justice ', (1947) 11 Conveyancer 244, 12 Conveyancer 91.

[28] *Frost* v. *Minister of Health*, [1935] 1 K.B. 286; *Offer*, [1936] 1 K.B. 40; *Miller*, [1946] K.B. 626; *Summers*, [1947] 1 All E.R. 184; *Johnson*, [1947] 2 All E.R. 395.

[29] *Stafford* v. *Minister of Health*, [1946] K.B. 621.

[30] *Errington* v. *Minister of Health*, [1935] 1 K.B. 249.

[31] *Horn* v. *Minister of Health*, [1937] 1 K.B. 164.

Has the *audi alteram partem* rule been infringed if the Minister fails to disclose to the objectors documents obtained by him *before* the 'quasi-*lis*' was joined but which the objectors allege were relevant to the dispute? In four recent cases [32] this question was answered in the negative: his obligation extends only to making available to both sides material formulated for his judicial consideration *after* objections have been lodged. In *B. Johnson & Co. (Builders), Ltd.* v. *Minister of Health*,[33] Lord Greene, M.R., finally disposed of the matter in a judgment which merits careful study. The objectors contended that a compulsory purchase order, made under section 71 of the Housing Act, 1936, should be quashed because of the Minister's failure to disclose to them relevant passages in certain letters which had been addressed by the local authority to the Ministry before objections had been lodged against the order. The passages to which exception was taken had stated that the site had 'already been provisionally accepted by the department as the site for the council's second year housing programme', that negotiations for an agreed purchase had proved unsuccessful, and that the owners were speculative builders who were demanding an excessive price for the land.

The fundamental reason why the Court of Appeal rejected the argument of the objectors was that to hold otherwise would be to assert that the courts were entitled to inquire into the departmental practices of the Ministry and thus encroach upon the Minister's political responsibilities. If the courts were to maintain their right to call for relevant materials obtained by the Minister in his 'administrative' capacity, they might themselves have to decide what materials were relevant. This might involve an examination of departmental files, and even the delivery of interrogatories to the Minister in respect of his oral interviews conducted some time before the question of making the order arose; for general considerations of housing policy might weigh heavily with the Minister and thus be relevant to his decision to confirm the order. The idea that a Minister could be compelled to disclose information which he had obtained as an administrator was in fact 'alien to our whole conception of government in this country'.[34] Nor was there any parallel between the instant case and the case of an ordinary litigant asking for discovery from the other party; here it was sought to obtain 'quasi-discovery' from the 'quasi-judge' and of material which he had not acquired in his 'quasi-judicial' capacity.

The general observations of the learned Master of the Rolls upon the Minister's functions in regard to the confirmation of such orders are of particular interest. He stressed that those functions were 'fundamentally administrative . . . subject only to the qualification

[32] *Miller* (*supra*); *Price*, [1947] 1 All E.R. 47; *Summers* (*supra*); *Johnson* (*infra*).
[33] [1947] 2 All E.R. 395.
[34] At p. 401.

that, at a particular stage and for a particular purpose, there is imposed on his administrative character a character which is loosely described as " quasi-judicial ". The language which has always been construed as giving rise to the obligations, whatever they may be, implied in the words " quasi-judicial " is to be found in the duty to consider objections. . . '.[35] His ultimate decision whether or not to confirm the order was an administrative decision, ' because it is not to be based purely on the view that he forms of the objections, *vis-à-vis* the desires of the local authority, but is to be guided by his view as to the policy which in the circumstances he ought to pursue '.[36] It was his duty to consider the interests of the public as well as those of the parties to the so-called *lis*. Accordingly, he was entitled to overrule the objections although he found them to be reasonable. He might be required to defend his attitude in Parliament, but his decision was

> not impeachable in the courts on the grounds on which a judicial decision might be impeached. . . . *It would be impossible for an objector to attempt to get the decision set aside on the grounds that the evidence at the inquiry, or the evidence put before the Minister in his quasi-judicial capacity, was insufficient to support his decision to confirm the order.*[37]

The term ' quasi-judicial ' needed to be ' very carefully watched ', since it was ' apt to lead to the fallacious view that the decision of the Minister is in some sense a " quasi-judicial " decision which can be challenged on the ground of lack of evidence, for instance, in the courts. . . '. Also it tended to introduce into the sphere of conduct which the phrase properly described, ' conceptions which are very suitable to the conduct of an ordinary piece of litigation, but which are quite unsuitable to the performance of the acts which have been entrusted to the Minister by Parliament '.[38]

These dicta, read together with the actual *ratio decidendi*, mean in effect that the Minister's order cannot be challenged unless he has exceeded his statutory powers altogether, or has omitted to comply with a specific requirement of the Act, or has failed to hold a proper inquiry, or has shown bad faith, or has contravened the *audi alteram partem* rule (as in *Errington* and *Stafford*[39]) while acting in his ' quasi-judicial ' capacity. It might also be thought that clear proof of bias would vitiate his discretion; but, for reasons which are given below,[40] it is far from certain that this view is correct. It is worth noting, moreover, that nowhere in the judgments in *Johnson* does the phrase ' natural justice ' appear.

The Stevenage Case :—The prospects of the optimistic property-owner are even worse when he seeks to impugn the validity of

[35] At p. 399.
[36] *Ibid.*
[37] At p. 400.
[38] *Ibid.*
[39] See notes 29 and 30, *supra.*
[40] Page 317.

orders made under recent town planning legislation. The Ministry of Town and Country Planning was established for the purpose of 'securing consistency and continuity in the framing and execution of a national policy with respect to the use and development of land throughout England and Wales'.[41] This purpose cannot be achieved without that extensive interference with private interests for which the 1947 Planning Act exhaustively provides. Ministry officials are in constant touch with the representatives of the local planning authorities, and the Minister may accordingly find it impossible to display 'the icy impartiality of a Rhadamanthus' when considering objections to a development plan or any major order submitted to him for confirmation. Still less can he be expected to behave as a disinterested arbiter when he himself makes the original draft order.

Thus, under section 1 of the New Towns Act, 1946, the Minister is empowered to make an order designating an area as the site of a new town after causing a public local inquiry to be held with respect to the objections lodged against his own draft order. By Schedule I he is obliged to consider the report of the person by whom the inquiry was held. The well-known case of *Franklin* v. *Minister of Town and Country Planning*[42] arose out of an order made by the Minister designating Stevenage as the site of a new town. Before the Bill had become law it was already obvious that the Government intended, as a matter of policy, to implement the recommendations of the Abercrombie Greater London Plan (1944) and the first Interim Report of the Reith Committee[43] to the extent of building a new town in Stevenage. Nevertheless, in the court of first instance, Henn Collins, J., quashed the order on the ground that the Minister had not considered the question 'Aye or No should the order be confirmed?' with 'an open mind'.[44] The learned judge held that the functions of the Minister in considering objections and the report on the inquiry were quasi-judicial, so that it was open to the objectors to attack the order on the ground that 'from and after the inception of the inquiry up to and including the moment at which the Minister decided to confirm his Order, he had not an open mind'.[45] He found that the Minister had shown bias in favour of the order by making a speech at Stevenage, while the Bill was still before Parliament (*i.e.*, before his quasi-judicial functions had begun), in which he had expressed his determination that Stevenage should become a new town; and he held that the objector had discharged the onus of proving the continuance of that state of mind until the confirmation of the order in that the Minister had confirmed it while vital questions of water supply and sewage disposal remained unsolved and might prove insoluble.

[41] Minister of Town and Country Planning Act, 1943, s. 1.
[42] [1947] 1 All E.R. 396; [1947] 1 All E.R. 612 (C.A.); [1948] A.C. 87.
[43] Cmd. 6759/1946, §§ 16–17.
[44] At p. 399.
[45] *Ibid.*

The Court of Appeal reversed this decision on the grounds that there was no evidence that such problems might in fact prove insoluble, and that there was no other proof of bias continuing up to the time when the order was finally confirmed. The House of Lords, in unanimously dismissing the appeal by the objectors, took a different view of the principles of law applicable to the case. Lord Thankerton, delivering the opinion of the House, said that no judicial or quasi-judicial duty was imposed on the Minister, and any reference to bias was irrelevant. The Minister was bound to satisfy himself that a scheme was a sound one before he took the initial step of issuing a draft order. The purpose of inviting objections and holding a public inquiry was merely 'the further information of the respondent'. His duties under s. 1 were 'purely administrative'; 'the only question is whether he has complied with the statutory directions to appoint a person to hold the public inquiry, and to consider that person's report'[46]; so that, assuming the inquiry itself to have been properly conducted, 'the only ground of challenge must be either that the respondent did not in fact consider the report and the objections . . . or that his mind was so foreclosed that he gave no genuine consideration to them. . . '.[47] The word 'bias' should be confined to its proper sphere, which was 'to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute'.[48]

It may be observed that the position of the objectors in this case would have been virtually hopeless from the outset, had not the Minister taken the most unusual step of delivering a public speech dealing with the subject-matter of the order before the order had been drafted.

Is the scope of judicial review still narrower in the *Stevenage* type of case, where the Minister confirms his own order, than in the *Johnson* type of case, where the Minister confirms the local authority's order? In both cases the courts, anxious to emphasise the limits of their own jurisdiction, were at pains to stress the fundamentally 'administrative' character of the Ministers' duties under the Acts. But whereas Lord Thankerton said that in considering objections to his own order the Minister acted administratively, Lord Greene said that in considering objections to a local authority's order the Minister of Health acted quasi-judicially. If this difference in terminology signifies any difference in the nature

[46] At p. 102.
[47] At p. 103.
[48] *Ibid.*

of the Minister's duties *vis-à-vis* the objectors, it can only mean that the rules of natural justice may be invoked in the latter case but not in the former. It may be, of course, that a Minister confirming his own order cannot possibly infringe the *audi alteram partem* rule in the way that it was infringed in *Errington's Case*, since the only 'parties' are the Minister himself and the objectors. It is believed, however, that the second criterion of natural justice, that of 'bias', is no more applicable to the one case than to the other. Had the objectors in *Johnson's Case* sought to invalidate the Minister's decision for bias, the Court of Appeal would probably have defined his rôle in very much the same words as Lord Thankerton used. The courts would have to recognise that there is necessarily a 'departmental bias' on the part of the Minister of Health which may incline him towards the acceptance of the proposals of the local authority. No Housing Act order has yet been quashed on the grounds of bias, and this is hardly surprising when inspectors' reports are not published and when the Minister cannot be compelled to disclose communications made to and by him before objections have been lodged.[49]

It is clear then, that judicial review of Ministers' functions is of a somewhat perfunctory character where the property-owner bases his case upon an alleged violation of natural justice.

III

The improper exercise of 'quasi-judicial' functions affords only one of a number of opportunities for the judicial control of public authorities. Discretionary powers of all kinds may be exceeded or otherwise abused; in particular, it may be contended that they have been exercised 'unreasonably' or on insufficient evidence or without any evidence. Although sweeping generalisations are to be avoided, it can be said that the majority of recent cases illustrate the same tendency that we stressed when discussing the concept of natural justice: the tendency for the courts to circumscribe the area of their control over statutory discretions.

(1) In numerous cases the doctrine of ultra vires has been successfully invoked where powers have been abused or simply exceeded. Powers conferred for one purpose must not be used for another.[50] Nor can an authority give itself power to act by incorrectly determining a preliminary fact without which it would have no power to act, unless the wording of the statute makes it

[49] Nor is there any general obligation imposed on the Minister or the local authority to give the objector reasons for the decision to confirm an order; though s. 41 of the 1936 Act requires the Minister to furnish the objector, in certain cases, with his reasons for deciding that a building is unfit for human habitation.

[50] See G. E. Treves, 'Administrative Discretion and Judicial Control', (1947) 10 Mod.L.Rev. 276.

clear that this preliminary determination lies solely within the discretion of that authority.[51]

The real difficulties have arisen in cases where it has been contended that the authority has abused its powers by taking into account extraneous matters or by omitting to consider relevant matters, but where the enabling Act has not expressly stated what are the relevant considerations. In many cases, particularly those concerning licensing authorities, the exercise of a discretion has been held to be invalid because an implied consideration has been overlooked or an impliedly excluded factor has been considered. Now, this seems very like saying that the authority concerned has acted 'unreasonably'.[52] However, the judgment of Lord Greene, M.R., in *Associated Provincial Picture Co.* v. *Wednesbury Corporation*[53] shows that these grounds of invalidity can sometimes be distinguished. In that case the corporation, as a licensing authority, was empowered by section 1 of the Sunday Entertainments Act, 1932, to grant cinematograph licences for Sunday performances 'subject to such conditions as the authority may think fit to impose . . .'. The corporation granted the appellants a licence subject to the condition that no child under 15 should be admitted to a performance. The appellants had claimed a declaration that this condition was unreasonable and therefore ultra vires. In giving judgment dismissing the appeal, Lord Greene said that considerations of the moral and physical well-being of children could properly be taken into account by the local authority; and that to establish the unreasonableness of the condition, as an independent ground of attack, 'overwhelming proof' would be required. The Act had conferred an administrative discretion on the local authority in the widest terms, and had made no provision for any appeal from its decision.

> The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority who are put in that position. . . .[54]

Lord Greene summarised the law as follows :

> The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or,

[51] Contrast *White & Collins* v. *Minister of Health*, [1939] 2 K.B. 838, with *R.* v. *Ludlow, ex p. Barnsley Corporation*, [1947] K.B. 634. See also *Wilkinson* v. *Barking Corporation*, [1948] 1 All E.R. 564. For a critical survey of some aspects of the problem, see D. M. Gordon in (1944) 60 L.Q.R. 250–261. For the American doctrine of jurisdictional fact see Dickinson, *Administrative Justice and the Supremacy of Law*, pp. 309 ff. and *passim*.

[52] Thus, in *Roberts* v. *Hopwood*, [1925] A.C. 578, the Poplar councillors were held to have acted 'unreasonably' in paying a minimum wage of £4 a week to their employees, on the grounds that they had failed to have regard to the practices of commercial employers and had allowed themselves to be guided by 'eccentric principles of Socialist philanthropy'.

[53] [1948] K.B. 223; approving *Harman* v. *Butt*, [1944] K.B. 491, and disapproving the majority judgment in *Theatre De Luxe (Halifax), Ltd.* v. *Gledhill*, [1915] 2 K.B. 49.

[54] At pp. 231–2.

> conversely, have . . . neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that . . . they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.[55]

Apart from its special points of interest, this judgment is a good example of the general trend of recent cases dealing with discretionary powers. The courts show a marked disinclination to interfere with the decisions of elected local authorities where those authorities have a discretion to determine what is in the public interest. They show an awareness of the fact that judicial review of the substance of such decision often means in effect that the court substitutes its own opinion of what is reasonable for the opinion of an authority which has a better opportunity to determine such a matter. The generosity which Parliament today shows in conferring very wide discretionary powers on these authorities reinforces the impression that the courts will be at least as slow to hold that they have been improperly exercised as courts have been in the past to invalidate by-laws on the grounds of unreasonableness. It is true that on rare occasions local authorities are reminded by the courts that even very liberal statutory powers can be abused; but it is seldom possible to draw any significant conclusions from these exceptional cases.[56]

It remains to be seen whether decisions by licensing justices, a non-elected body, will enjoy an equal immunity. In the High Court these have usually been attacked on the grounds that extraneous factors have been considered or collateral motives pursued, rather than they are in themselves unreasonable, and, as long as the strategy of indirect approach seems more profitable, frontal assault may be seldom attempted.

(2) If the courts are slow to interfere with the bona fide exercise of a discretion by a local authority, they are still more reluctant to review a discretion entrusted to a Minister who is responsible to Parliament. This attitude is well exemplified by Lord Greene's dicta in *Johnson's Case*, already quoted,[57] in which he emphasised

[55] At pp. 233–4.

[56] See, *e.g.*, *Middlesex C.C.* v. *Miller*, [1948] K.B. 438, a decision which can only be justified by the presence of unusual facts in the case. For decisions more in conformity with recent trends, see *Taylor* v. *Brighton Corporation*, [1947] K.B. 736, and *Swindon Corporation* v. *Pearce*, [1948] 2 All E.R. 119, though it should be noted that these were concerned with a different statute.

[57] Page 314, *supra*. Contrast with these dicta Lord Greene's judgment in *Minister of National Revenue* v. *Wrights' Canadian Ropes, Ltd.*, [1947]

the finality of the Minister's 'administrative' decision regarding the confirmation of a compulsory purchase order.

Again, the courts have refused to review the merits of slum clearance orders confirmed by the Minister under the procedure laid down in sections 25 and 26 and Schedules I and III of the Housing Act, 1936. The Act provides that if a local authority is satisfied that houses in its district are, *e.g.*, unfit for human habitation, it may pass a resolution declaring the area concerned to be a clearance area. If it then wishes to have the area demolished, it must submit a clearance order to be confirmed by the Minister, subject to the usual provisions as to objections and local inquiries. Schedule II incorporates a provision which applies to compulsory purchase orders as well as clearance orders and which is found in a number of recent statutes: once an order is confirmed, persons wishing to impugn its validity must apply to the High Court within six weeks, and the order will be quashed only if it is 'not within the powers of the Act' or if 'the interests of the applicant have been substantially prejudiced by any requirement of this Act not having been complied with'. The courts have held that it is not open for the applicant to assert that there was *insufficient* evidence to show that, *e.g.*, his houses were unfit for habitation. In *Re Bowman*, Swift, J., indicated that the courts might intervene if it were ever shown that

> there was no material, no information and no representation before the local authority upon which they could, as reasonable people, possibly be satisfied that a clearance order ought to be made.[58]

What this test appears to mean is that an order made without any evidence at all would, in effect, be an order made in bad faith, so that an implied requirement of the Act would not have been complied with. It is not surprising that no applicant has yet succeeded in discharging the necessary burden of proof. Only an order which was plainly absurd would be likely to succumb to a challenge.

But perhaps the most striking example of judicial self-abnegation is afforded by the recent case of *Robinson* v. *Minister of Town and County Planning*.[59] The litigation arose out of section 1 (1) of the Town and Country Planning Act, 1944, which provided that where the Minister 'is satisfied that it is requisite', for the purpose of dealing satisfactorily with extensive war damage in the area of a local planning authority, that parts of the area,

A.C. 107 (P.C.) an income tax appeal from Canada. Although the Minister in that case was empowered by statute to disallow any expense 'which he in his discretion may determine to be in excess of what is reasonable or normal' for the tax-payer's business, Lord Greene held that the Minister's discretion, though very wide, had to be exercised 'according to law' and not 'arbitrarily'. See further, (1947) 21 Australian L.J. 267–8, and (1948) 26 Can.Bar Rev. 328–30.

[58] [1932] 2 K.B. 621 at p. 634: followed in *Re Falmouth Clearance Order*, 1936, [1937] 3 All E.R. 308; *Stocker* v. *Minister of Health*, [1938] 1 K.B. 655; *Re L.C.C. Order*, 1938, [1945] 2 All E.R. 484.

[59] [1947] K.B. 702.

consisting of land 'shown to his satisfaction' to have sustained war damage and of any land adjacent thereto, should be laid out afresh and re-developed as a whole, he could make an order declaring all or any of such land to be subject to compulsory purchase, if a proper application in that behalf was made to him by the authority concerned. Provision was made for the lodging and consideration of objections, but the Minister was not compelled to hold any public or private inquiry if he was satisfied that the statements of objection gave him sufficient information. Applications to have the order set aside were governed by the 'six weeks' standard clause.

The Minister made an order designating an area in Plymouth, after having held a public inquiry, and objectors applied to have it quashed in so far as it affected their premises. They contended that it was ultra vires the Act, inasmuch as there was no evidence before the Minister that their property was in fact to be laid out afresh or redeveloped, so that the Minister could not, as a matter of law,[60] possibly be satisfied that it was requisite to lay it out afresh or re-develop it. They relied upon the argument that on the face of the lay-out plan submitted by the Plymouth City Council, coupled with the evidence given on behalf of the council at the inquiry, no intention to lay out afresh or redevelop their property had been manifested.

The Court of Appeal, reversing the decision of the court below, upheld the order. This was a case of

> an original order to be made by the Minister as an executive authority who is at liberty to base his opinion on whatever material he thinks fit. . . .[61]

The wording of the Act showed that he was in no way bound to accept the lay-out proposed by the local authority. Nor could he be confined, in exercising his discretion, to the evidence tendered at the local inquiry, which he had chosen to order for his further information. He was entitled to be influenced by his own views as to general policy, and also by material obtained by him in his 'administrative' capacity. And the court could not, in order to determine whether there was evidence to support the order, compel him to disclose information obtained in that capacity. Except in relation to the inquiry itself, his functions throughout were administrative (or 'executive').

It would seem that the only possible grounds for challenging such an order would be that the inquiry was improperly conducted, or that the Minister had overstepped his powers altogether or had

[60] Cf. the position under the Income Tax Acts, where a right of appeal to the courts is given against a decision of the Commissioners if 'erroneous in point of law'. A conclusion of fact arrived at by the Commissioners without *any* supporting evidence is treated as being contrary to law. See Hamilton, J., in *American Thread Co.* v. *Joyce* (1911), 104 L.T. 217, and A. Farnsworth in (1946) 62 L.Q.R. 248–65.

[61] At p. 716.

acted in bad faith (this was not alleged in *Robinson's Case*); or, as Somervell, L.J., suggested,[62] in the unlikely event of an authority submitting a plan which showed on the face of it that the area had suffered little or no war damage, it might be held that an order made in such circumstances did not comply with the requirements of the Act.

It must be added that the court held that, on the true construction of the Act, it was not necessary for every piece of land in the area to be laid out afresh or redeveloped. Yet, even had it accepted the opposite construction urged on behalf of the property-owners, it would still have declined to investigate whether or not the property was in fact to be laid out afresh.

In *Robinson's Case* the decision of Henn Collins, J., in *Phoenix Assurance Co.* v. *The Minister*[63] was disapproved. That case arose out of the same Plymouth Declaratory Order. The facts were very slightly different, and the actual decision in the case is no longer of importance since its effect has been nullified by section 5 of the 1947 Planning Act; but parts of the judgment are of interest. The learned judge held that the Minister's satisfaction as to the facts stated in section 1 had to be based on reasonable grounds. He appears to have reached this conclusion for two main reasons: (1) The statute was 'one which impinges on the rights of owners of property, it may be very heavily',[64] and should therefore be construed in favour of the individual, in contrast to Regulation 18B of the Defence Regulations, which was a measure by way of preventing a public danger; (2) the Act would not have provided a code of procedure for hearing objections if the Minister's functions were to be purely 'executive'.

> Why, he asked, is he required by statute to hear objections or to hear both sides if he hears one, if his functions are purely executive? . . . why should the legislation have made it incumbent upon him if in the last resort he can properly form his opinion without any grounds at all?[65]

It may be said, with respect, that the first point illustrates the dangers of employing venerable common law principles of statutory interpretation in a context where they may well frustrate the intentions of Parliament[66]; and that point (2) is inconclusive. For even assuming that when considering objections to his contemplated order the Minister was acting in a 'quasi-judicial' rôle, this fact in itself would not justify the conclusion that the Minister's final decision to make the order was a species of 'quasi-judicial' decision which could be reviewed on its merits.

(3) Finally, it is interesting to note the very different approach

[62] At p. 724.
[63] [1947] 1 All E.R. 454.
[64] At p. 457.
[65] *Ibid.*
[66] See (1947) 10 Mod.L.R. 329.

adopted by American administrative law towards the question of judicial review.

Section 10 (*e*) of the Federal Administrative Procedure Act, 1946, requires (*inter alia*) that administrative agencies should base their determinations on 'substantial evidence'. This provision, in the opinion of some leading authorities in the United States, does no more than re-state a long-established rule applied by the American courts.[67] In a leading case it was said:

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[68]

Superficially this definition does not seem to open up a very wide field of discretions for review; it invites comparison with the attitude of the English Courts of Appeal when asked to grant a new trial on the grounds that the verdict of a jury was against the weight of the evidence; in his well-known judgment in *Metropolitan Ry.* v. *Wright*,[69] Lord Halsbury said that a verdict which 'reasonable men *might* find' would not be upset. None the less, judicial review of the substance of determinations made by public authorities is successfully invoked far more frequently in the United States than in England.[70] American courts have in general been less disturbed by the prospect that review of such determinations may mean the substitution of their own opinion for that of the authority to whom the discretion was entrusted.

IV

We have seen that the doctrine of ultra vires has now lost much of its former effectiveness as a means of controlling the action of the Executive. Modern legislation has conferred the widest discretionary powers upon Ministers and local authorities for the implementation of policies of economic regulation and social reform which have received the general approval of the electorate. The courts, acknowledging the supremacy of Parliament, are now loath to accept the argument that it is their function to require the Executive to observe standards of fairness which the Legislature has not thought fit to impose expressly upon it. They still insist that a Minister shall not step outside the limits of his statutory

[67] There is a conflict of opinion on this point. Some American authorities expect the scope of judicial review to be broadened by this provision. N. L. Nathanson, commenting on the Act in (1946) 41 Ill.L.Rev. 368, 416–7, considers the whole problem to be too subtle to appraise the significance of these statutory provisions in the abstract, but he suggests that lower federal judges may be encouraged to inquire more freely into administrative findings of fact.

[68] *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 229 (1938).

[69] (1886), 11 App.Cas. 152 at p. 156. In the United States the Supreme Court has held that the substantial evidence rule and the criteria for reviewing the verdict of a jury are identical: *N.L.R.B.* v. *Columbian Co.*, 306 U.S. 292, 300 (1939). For a further discussion, see Robert L. Stern, 'Review of Findings of Administrators, Judges and Juries', (1944) 58 Harv.L.Rev. 70.

[70] For numerous cases, see the chapters on Administrative Law in the *Annual Survey of American Law*, 1942–6.

powers, that he shall comply with any procedural requirements which are prescribed in the Act as conditions precedent to the exercise of a valid discretion, and that he shall act in good faith (though proof of bad faith may be almost impossible to obtain); but, in general, if he acts unfairly he must answer for his misconduct to the body which has entrusted him with his sweeping discretionary powers.

Accordingly, in recent cases the courts have emphasised the 'administrative' character of Ministers' statutory duties in various contexts. They call a function 'administrative' when they prefer not to subject its exercise to review, just as they have called a function 'judicial' or 'quasi-judicial' when they have wished to review it. Where a Minister has to decide whether or not to confirm a compulsory purchase order, his final decision is called 'administrative' because the courts are not prepared to inquire into the evidence on which it is based, and the 'quasi-judicial' character of his functions prior to the act of confirmation is confined by the courts within very narrow limits (if accepted at all) because the courts recognise the serious difficulties of applying the criteria of 'natural justice' to the performance of such functions.

In the years immediately preceding the Second World War it was possible to represent the courts as being on the whole less sympathetic to the administrator than to the property-owner. Such a thesis could not be argued today. On the other hand, it would be absurd to accuse the courts of showing any tendency to favour the Executive.[71] It would be still more absurd to condemn them for a disinclination to behave as the ultimate defenders of private proprietary rights against the encroachments of an oppressive State power. Nothing could be more damaging to the proper administration of justice in this country than for the courts to adopt an attitude of partisanship which would inevitably cause them to become the centre of an acute political controversy.

None the less, few will choose to regard the present state of affairs with complacency. The private citizen today finds the cost of litigation prohibitive and the chances of success very meagre when he contemplates challenging a ministerial order. And though it is generally true to say that the administrator may have to answer politically for his acts, in modern political conditions it is exceptional for individual cases of injustice to receive adequate attention. It may be that the swift and efficient execution of social policy is more important than the interests of individual owners of property; but it does not follow that it is in the public interest for the administrator's conduct to be governed by little more than the dictates of his own conscience. The new economic

[71] The judgments delivered in the Court of Appeal in *Blackpool Corporation* v. *Locker*, [1948] K.B. 349, are sufficient refutations of any such suggestions.

and political conditions of this age will eventually demand a comprehensive review of the machinery of government. It is suggested that one very necessary reform would be accomplished by providing for appeals to be lodged against the substance of many of those determinations made by public authorities which are at present immune from judicial review. The types of such determinations in respect of which appeals should be permitted would require careful definition; and in any event appeals should normally lie not to the ordinary courts, which are for a number of reasons unsuited to fulfil this function, but to specially constituted tribunals. This particular reform is adumbrated, not because it is in itself a sufficient remedy for the defects of administrative justice, but because its necessity is perhaps the most manifest.

S. A. de Smith.

PROOF OF FOREIGN MARRIAGES

THE occasions when it may be necessary to prove in our courts that a marriage was celebrated in a foreign country are by no means infrequent. Accordingly the correct method of proving a foreign marriage is of no little importance. Yet the statements of the law on this subject in the three leading textbooks on divorce conflict as to the use which may be made of a foreign marriage certificate. Phillips and Rayden assert that an expert must give evidence that the certificate is accepted in the foreign court as prima facie evidence of a valid marriage, while Latey holds quite a different view.[1]

It is proposed in this note to examine the principles governing the proof of foreign marriages, other than those which have been celebrated in accordance with the Foreign Marriages Act, 1892, an Act which was designed to obviate the difficulties of proof of foreign marriages not so celebrated.

All 'judicial transactions'[2] involve two elements, facts and law. In the case of marriage we have on the one hand a series of acts, the forms and solemnities constituting the marriage ceremony, in which generally not only the husband and wife but also third parties are involved, and on the other hand, the rules of law applicable to marriage ceremonies. These rules determine whether or no the status of marriage may be ascribed to the man and woman in question; in other words, whether they have been validly married. But the term validity embraces a number of aspects.

[1] Phillips, *Practice of the Divorce Division.* 'Expert evidence of the law of the country in which the marriage was celebrated must be called. The witness must speak to the validity of the marriage according to such law and show that the marriage certificate would be accepted in the courts of such country as prima facie evidence of a valid marriage.' (3rd ed., p. 187.)

Rayden, *Divorce.* 'Proof of "foreign" marriages. In addition to the evidence of the petitioner and the production of a certificate of marriage the evidence of an expert is necessary to prove that such certificate would be accepted in the country of its origin, as prima facie evidence that a valid marriage had taken place.' (4th ed., p. 314.)

Latey, *Law and Practice in Divorce and Matrimonial Causes.* 'The validity of such marriages by the lex loci . . . must be proved by expert evidence: and if they have been registered, proof must be given that the register is required to be kept by the lex loci. Its contents may then be proved either by examined copy or by certified copy purporting to be signed by the official who keeps the register and whose signature is recognised, *e.g.*, by a witness who is acquainted with it; or by the affidavit of the London Consul of the foreign country; or by the certificate of a local notary and countersigned by the local British Consul; or, perhaps now, by the certificate of the British Consul alone, whose signature will be judicially noticed. But the certificate verified must purport to be a copy of the register and not merely a quotation therefrom or the mere assertion of the proof of the marriage.' (13th ed., p. 336.)

[2] We have no recognised technical term in common use to denote a complex of acts governed by a legal rule.

These may be called (a) formal validity; the rules of law state what ceremony is regarded as a marriage ceremony, (b) personal validity; the rules of law state whether the parties have the capacity to marry, (c) essential validity; the rules of law state other requirements, *e.g.*, the rules relating to the prohibited degrees of consanguinity.[3]

Thus the phrase 'proof of a valid marriage' refers both to proof of facts and to proof of law. Questions as to the proof of facts are answered by our law of evidence, wherever the facts may have occurred.[4] Questions of law, however, may involve a reference to a foreign law, which has to be proved by an expert in that foreign law.[5]

One of the main issues of fact in connection with the validity of a foreign marriage is whether a particular ceremony has been celebrated. It is trite law that to determine this question it is immaterial what the foreign law of evidence is, what is material is our law of evidence. Thus, in *Abbott* v. *Abbott and Godoy*, the Judge Ordinary (Sir Cresswell Cresswell), referring to a foreign marriage register, said: 'It would not be admissible here simply because it is admissible in foreign courts'.[6] In *Finlay* v. *Finlay and Rudell*[7] counsel attempted to prove a marriage in Portugal by reference to a foreign register. An expert in the law of Portugal had given evidence, and counsel submitted: 'If by the law of Portugal such a reference is proof of a marriage, it is also proof here', but he was overruled by the Judge Ordinary, who replied: 'No, we are not bound by the rules of evidence of foreign countries. We must be guided by our own rules'. Yet, as we have seen, Phillips and Rayden state that, if a foreign marriage is being proved with the aid of a marriage certificate, an expert in the law of the country must testify that in the courts of the foreign country the certificate would be prima facie evidence that a valid marriage has taken place. Thus, their statements appear to be contrary to the above fundamental and well-established doctrine.

Nevertheless, authority is not entirely lacking to support the proposition put forward by Phillips and Rayden. In *Perth* v. *Perth*[8] a Committee of Privileges accepted the contention of the Lord Advocate and Attorney-General that French registers of attested marriages could not be proved simply by attested copies, but that a French lawyer was required to prove that the registers were kept according to the laws of France, and, moreover, that they would be received in evidence in that country. This case, of course, has not the same authority as if the judges had been sitting in the

[3] See Dicey, *Conflict of Laws*, 5th ed., p. 749.
[4] *Ibid.*, pp. 849, 855.
[5] *Ibid.*, pp. 859–862.
[6] (1860), 4 Sw. & Tr. 254 at p. 256.
[7] (1862), 31 L.J.P. 147.
[8] (1846), 2 H.L.C. 865. The members of the committee were Lords Cottenham, Lyndhurst, Brougham and Campbell.

House of Lords on an appeal, nor does it deal with a mere marriage certificate.

In *Lyell* v. *Kennedy* [9] the Earl of Selborne, L.C., said : ' Foreign registers of baptisms and marriages, or certified extracts from them, are receivable in evidence in the courts of this country, as to those matters which are properly and regularly recorded in them, when it sufficiently appears (in the words of Mr. Hubback's learned work on *Evidence*) that they ' have been kept under the sanction of public authority and are recognised by the tribunals of the country ' (*i.e.*, of the country in which they are kept) ' as authentic records '. This dictum has been cited as authority for the proposition that a marriage certificate is receivable in evidence to prove a foreign marriage, if receivable in the foreign courts. It would appear, however, that the extract quoted from Hubback applies to foreign registers only. Extracts are admissible when certified to be correct, but such certificates have to be properly proved.

The cases of *Cooper-King* v. *Cooper-King*,[10] *Wilson* v. *Wilson*,[11] *Barford* v. *Barford*,[12] and *Mondschein* v. *Mondschein*,[13] are further authority for the proposition that a marriage certificate is adequate to prove a foreign marriage if supported by expert evidence to the effect (a) that the marriage described in the certificate is valid according to foreign law, and (b) that the certificate would be admitted in evidence in the foreign country. These, however, were all cases of first instance in which there was no argument, and no reasoned judgment. The expert's evidence included a reference to the admissibility of the marriage certificate in the foreign country, and the judge accepted the evidence as a whole without comment.

The weight of authority in support of Phillips and Rayden is thus not very great, particularly in view of the fact that in none of the cases was reference made to the doctrine that the rules of evidence are determined by the lex fori.

The evidence of a foreign lawyer is, of course, necessary to prove the formal validity of a foreign marriage, because that validity depends upon the *lex loci celebrationis*. But in certain circumstances it is also required, for the following reasons, for the purpose of our law of evidence dealing with the proof of the facts of the ceremony.

The facts of the ceremony can be proved, like any other facts, by witnesses. In the Divorce Court affidavit evidence may be given in appropriate cases: but documentary evidence, subject to the exceptions made by the Evidence Act, 1938, is generally hearsay

[9] (1889), 14 App.Cas. 437. The dictum quoted is at p. 448. It should be noted that Hubback's reference to the foreign tribunals does not entail a question of foreign evidence but merely of the foreign court's requirements about the register.
[10] [1900] P. 65.
[11] [1903] P. 157.
[12] [1918] P.140.
[13] (1921), 37 T.L.R. 665.

and so excluded. There is, however, an important exception to the hearsay doctrine, *viz.*, that relating to public documents. This exception is thus stated by Stephen: 'An entry in any . . . register, kept . . . in any foreign country, stating, for the purpose of being referred to by the public, a fact in issue . . . and made in proper time by any person in the discharge of any duty imposed upon him by the law of the place in which such . . . register is kept'[14] is admissible. It follows that, if by the law of the foreign country a register has to be kept of marriages celebrated there, that ceremony may be proved by an entry in the register.[15] Further, since the register itself cannot be produced, secondary evidence is admissible of such an entry.[16] A marriage certificate, if it be secondary evidence of an entry in a foreign register, is thus admissible to prove the foreign marriage in our courts, irrespective of whether it is admissible in the foreign courts.

Three conditions, it will be noted, have to be fulfilled before the marriage certificate is admissible: (1) The marriage certificate must be a copy of an extract from a foreign register, and not a mere statement that a marriage has been solemnised.[17][18] (2) It must be proved that the register is one which is required to be kept by the foreign law.[19] This has to be proved by an expert in the foreign law. It has been suggested that proving a marriage certificate is admissible in a foreign court may be a means of showing that the register from which it is an extract complies with this condition. This suggestion is supported by a dictum of Sir Cresswell Cresswell in *Abbott* v. *Abbott and Godoy*. Referring to a certified extract of a marriage register he said: 'The fact of its being admissible in foreign courts may be necessary to prove that it is an authorised register, to give it a character'.[20] Nevertheless it would appear better to have more direct evidence that the foreign register is a public document. Since evidence of a foreign lawyer is required, it is a simple matter to obtain direct evidence from him of the public

[14] *Digest of the Law of Evidence*, Art. 34, 9th ed., p. 67.

[15] It is assumed in the authorities that a foreign register of marriages is one to which the public have access. As to the necessity for access by the public to constitute a document a public document see the note by the editor of *The Law Quarterly Review* (1947), 63 L.Q.R. 271.

[16] *Alivon* v. *Furnivall* (1834), 1 C.M. & R. 277.

[17] *Finlay* v. *Finlay and Rudell* (1862), 31 L.J.P. 147.

[18] What is the position where no register is kept but the parties are given a document signed by the officials conducting the ceremony, which certifies that a marriage has been celebrated? This situation is suggested by the lack of clarity in the statement of the facts in the report of *Brinkley* v. *Att.-Gen.* (1890), 15 P.D. 76. One possible view of the facts is that the certificate itself constituted the significant part of the ceremony. But if that were so it should have been proved in the same way as any document is proved to be what it purports to be: yet the certificate was accepted without such proof. Another possible view is that the certificate was the equivalent of the register itself. But can a document in private custody be a public document so as to prove itself?

[19] It is assumed in the authorities that a register of marriage is one to which the public have access. See above, note 14.

[20] (1860), 4 Sw. & Tr. 254 at p. 256.

character of the foreign register. (3) Though a public document proves itself,[21] a marriage certificate, being only a copy of part of the register, should satisfy the requirements for secondary evidence. Thus, Latey considers that an unverified marriage certificate is inadequate.[22] But there are a number of cases in which the marriage certificate was regarded as proving itself.[23] It is true that they are all cases of first instance, but the practice they appear to have established is a highly convenient one. A marriage certificate should be accepted unless its authenticity is challenged. A British marriage certificate proves itself by virtue of the provisions of section 14 of the Evidence Act, 1851.[24] It appears, however, in view of its concluding words, that the section does not apply to a foreign marriage certificate.[25] If principle be required to support the practice perhaps it can be found in the extension of the concept of a public document to include one which is required by law to be issued.

Any doubt which may exist at common law whether a marriage certificate is receivable per se, without verification of its correctness, as proof of the contents of the foreign register, appears to be removed by section 1 of the Evidence Act, 1938.[26] The certificate

21 For the application to a foreign register of birth, see *Burnaby* v. *Bailie* (1889), 42 Ch.D. 282 at p. 291.

22 *Supra*, note 1.

23 See the cases noted above in notes 10 to 13, and also *Brinkley* v. *Att.-Gen.* (1890), 15 P.D. 76. Latey cites this latter case as authority for the proposition that an entry in a register may be proved by a certified copy purporting to be signed by the official who keeps the register, provided the signature is verified. But in *Brinkley* v. *Att.-Gen.*, the witness did not verify the signature; he merely stated that he recognised the names of the officials who signed as being the names of persons holding certain offices making them competent to issue the certificate.

24 14 & 15 Vict. c. 99, s. 14: 'Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by the consent of the parties authority to hear, receive and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy of the extract by the officer to whose custody the original is intrusted and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words'.

25 The point was raised in *Abbott* v. *Abbott and Godoy* (1860), 4 Sw. & Tr. 254. See the argument of Dr. Twiss at p. 255.

26 Evidence Act, 1938, s. 1 (1): 'In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document be admissible as evidence of that fact if the following conditions are satisfied, that is to say:—(*a*) if the maker of the statement either—(i) had personal knowledge of the matters dealt with by the statement; or . . . . Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if . . . if he is beyond the seas and it is not reasonably practicable to secure his attendance . . . '. Subs. (5): 'For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the foregoing provisions, the court may draw any reasonable inference

is a document, and a statement therein that it contains an extract from the foreign register is one 'tending to establish that fact', *viz.*, the content of the foreign register. The conditions of the section are satisfied wherever the certificate is issued by a person having 'personal knowledge of the matters dealt with by the statement', and it is submitted that there is compliance with section 1 (5) because it is a 'reasonable inference' that a person issuing a marriage certificate which purports to be founded on a register has personal knowledge of the register. Moreover, the proviso to section 1 (1) dispenses with the need for the person signing the certificate to be called as a witness, since he is beyond the seas, and it is not reasonably possible to secure his attendance.

Does the person seeking to establish a foreign marriage have also to prove the personal and essential validity of the marriage? He has to prove the ceremony is formally valid in order to prove that it is a marriage ceremony, but it is submitted that once that is done then the general validity of the marriage should be presumed.[27] A person proving a foreign marriage is no more required to prove that it is not bigamous than one proving an English marriage. The presumption of accordance with the law should, moreover, apply to the foreign law as well as to English law. Rayden and Phillips speak of the expert proving the validity of the marriage and do not qualify the term 'validity'. But what they have in mind is formal validity, for the witness is required by them to be expert in the law of the place where the marriage is celebrated. The *lex loci celebrationis* determines formal validity, but the question, for example, of capacity depends on the law of the domicile and not on the lex loci.

J. L. Montrose.

from the form or contents of the document in which the statement is contained . . .'.

[27] The question of classification of a particular ceremony as being a marriage ceremony also arises. A ceremony may be formally valid as a polygamous union according to the laws of a foreign country and yet not recognised as a marriage by our courts. See *Hyde* v. *Hyde* (1866), L.R. 1 P. & M. 130; *Srini Vasan* v. *Srini Vasan*, [1946] P. 67; *Baindail* v. *Baindail*, [1946] P. 122.

REPORTS OF COMMITTEES

PARLIAMENT BILL, 1947: AGREED STATEMENT ON CONCLUSION OF CONFERENCE OF PARTY LEADERS, FEBRUARY–APRIL, 1948.

(Cmd. 7380)

THIS modestly presented Paper of half-a-dozen small pages takes its place as one of the significant documents devoted to a discussion of the Second Chamber in the British Constitution. Comparison is, of course, immediately invited with Lord Bryce's Letter to the Prime Minister in 1918, embodying the views expressed and the majority conclusions reached by the all-party Conference set up in 1917. But both have, in fact, to be read in the context of the long story of proposals for the reform of the House of Lords and the very much longer story of the relations between Lords and Commons.

The last eighty years have seen certainly no fewer than a dozen more or less comprehensive schemes for the reform of the Lords, from Earl Russell's Life Peerages Bill of 1869 to Lord Salisbury's proposals of 1933. The same period has, however, witnessed the passing of no more than two Acts of Parliament (in 1876, adding the Law Lords, and 1911) altering the composition or powers of the Upper Chamber. 'In tranquil times', wrote Lord Loreburn in 1910 of the British Constitution, 'we never think about it. In time of conflict . . . we are too intent on the social and fiscal needs of the day . . . to give adequate consideration to the machinery of Government.' But not so intent, he might have added, as to fail to give that minimum of attention which is sufficient to ensure that the particular and immediate difficulty is overcome; the Liberal Budget was linked to the Parliament Act as the Labour nationalisation of steel is linked to the Parliament Bill, 1947. But this fact, that reform so often emerges as the result of a particular crisis, aggravates the confusion at such times as to whether the measures proposed involve points of principle or only of detail. To the reformer with his eye on the nearer objective it is 'merely' a matter of adjustment; opponents of the change are seldom convinced on that point. Thus, Mr. Morrison, in the Commons on November 11 last, argued that the Parliament Bill contained no 'matter of principle' but concerned only 'a question of degree, of fair judgment and of practical efficiency'. Lord Salisbury, on the other hand, told the Lords in January that the Bill would 'destroy the essential balance of the Constitution'.

The difficulty is sharpened in the present case by the narrow scope of the Bill itself—designed to alter only the period over which the Lords may effect delay in the passing of a Bill—and by the apparently narrow gap between the views of the parties on this

particular point. The Government representatives at the talks ' would have been prepared to suggest to the Labour Party that the " period of delay " which, under the Parliament Bill, would be one year from the Second Reading in the Commons on the first occasion, should be extended to nine months from the Third Reading if, in the case of a particular Bill, the latter period proved to be the longer '. The Opposition leaders for their part ' would have been prepared to suggest for consideration by their supporters . . . a period of twelve months from the Third Reading '. It is, indeed, tempting to conclude that a matter of three months must be something a good deal less than a ' matter of principle '. For the same reason, it was not surprising that compromise proposals followed the announcement of failure to reach agreement. Of these, the suggestion made in the correspondence colums of *The Times* of May 8 ' that the veto should be twelve months for the first three years of a Parliament and nine months for the remainder ' was perhaps the most helpful.

Behind the ' three months gap ', however, lies a gap in constitutional theory which is not so easily bridged. The Government representatives take the view that ' the danger in modern conditions is that the machinery of democratic government may act too slowly rather than too quickly '. Moreover, the case which they clearly regard as typical is that of a House of Commons, consistently responsive to the People, thwarted in its fourth and fifth session by a Second Chamber not directly responsible to the electorate. Against this, the Opposition leaders, while insisting that ' the purpose of the power of delay . . . has never been to enable the Second Chamber to thwart the will of the People ', hold that the Government proposals amount to ' the virtual elimination of the suspensory period ' and ' a formidable step towards Single Chamber Government, . . . an especial danger in a country . . . where fundamental constitutional changes can be made by a simple Bill '. The typical case, on this view, is that of a House of Commons regimented by a Government which has lost contact with the People. Briefly, for the Labour Party, a Second Chamber may possess ' proper facilities for debating public affairs and for revising legislation ' but it should do so by way of assisting the work of the popular assembly. For the Conservative Party, on the other hand, it is the power of delay which is crucial, and it is so, not because it is necessary for the better functioning of the Commons, but rather because it is ' an essential constitutional safeguard '; it was an aspect of this view which Lord Salisbury expressed in 1880 when he said that it was the duty of the House of Lords ' to represent the permanent as opposed to the passing feelings of the English nation '. Almost it may be said that one party tests the value of a Second Chamber by its usefulness to the Commons, while the other judges it by its capacity, on proper occasion, to be inconvenient to the Lower House.

This important divergence of viewpoint as to the proper role of the Second Chamber is one of the features which distinguish the present constitutional debate from those of 1910–11 and even 1917–18. The Rosebery Committee of 1907–8, appointed to consider suggestions 'for increasing the efficiency of the House of Lords', concerned itself almost exclusively with problems of composition, being content to remark, so far as relations between the two Houses were concerned, that 'the party in power in the elected chamber should be able to count upon a substantial following in the House of Lords', but failing to add any suggestions as to methods whereby deadlocks might be resolved. Again, the Bryce Conference appears to have encountered no serious difficulty in formulating its famous list of functions proper to a Second Chamber; the bulk of its time was devoted to methods of constituting the Chamber and techniques for adjusting differences of opinion between the two Houses. It is, of course, true that whatever were the preoccupations of the Rosebery Committee, it was a question of powers and not composition when it came to the Parliament Act three years later. It is equally true that the agreement in the Bryce Conference on the functions of a Second Chamber obscures the fact that in the same year the manifesto of the Labour Party boldly proclaimed: 'The Party stands . . . for the complete abolition of the House of Lords and for a most strenuous opposition to any machinery for revision of legislation taking the form of a new Second Chamber, whether elected or not, having in it any element of heredity or privilege or of control of the House of Commons by any party or class'.

Even so, the change of emphasis is real; only of comparatively recent years has the main battleground shifted from composition to functions. Not that the two aspects have been separable; but discussion has proceeded on the basis of 'pegging' one in order to analyse the other more easily—and it has been usual to take the functions as given. This process is reversed in the Agreed Statement: 'proposals relating to the reform of the Composition of the House of Lords were discussed first'. It was on this subject that considerable agreement was reached. But it is as easy to exaggerate the significance of the agreement on composition as it is to minimise the extent of difference of opinion on the period of delay. The statement reads: 'If it had been possible to achieve general agreement over the whole field of Powers and Composition, the Party representatives would have been prepared to give the following proposals further consideration, so as to see whether the necessary details could be worked out, and, if so, to submit them, as part of such an agreement, to their respective parties'. More serious than the qualifications contained in that careful phrasing is the vague character of the proposals listed. The stipulation that 'the revised constitution of the House of Lords should be such as to secure as far as practicable that a permanent majority is not assured for any one political party' is of limited value until methods of

implementing it are discussed. The statement that ' the present right to attend and vote based solely on heredity should not by itself constitute a qualification for admission to a reformed Second Chamber ' is found in the Report of the 1908 Committee. The suggestion that ' members of the Second Chamber should be styled " Lords of Parliament " and would be appointed on grounds of personal distinction or public service ' does not take us very far, unless it is clear as to who is to make the appointments, and whether any definition of the qualifications is to be attempted, though the rejection of systems of election to the Second Chamber is worth noting. There is a similar lack of novelty or a similar ambiguity about most of the proposals relating to composition; had further discussion taken place on these points—even without reference to the parties' supporters—it seems likely that agreement would have been more difficult to secure.

W. H. Morris Jones.

RECENT PERIODICAL LITERATURE

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Labour Organisation. J. Kovner: The legal protection of civil liberties within Unions, 1948 Wisconsin L.R. 18.

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W. A. Steiner.

THE INDIAN LAW REVIEW

We have received the first volume of this interesting new venture, to which we wish every success. The articles, many of them written by lawyers with English qualifications, are very varied in scope, many being of general interest. Space does not permit of reference to them in detail, but mention may be made of Mr. S. C. Mitter's treatment of the extraordinary *Bhowal Case,* an Indian Tichborne Case which in some respects is more peculiar even than that *cause célèbre.*

C.

NOTES OF CASES

DELEGATED LEGISLATION AND REQUISITIONING POWERS

Blackpool Corporation v. *Locker*, [1948] K.B. 349, threatens to become something of a *cause célèbre* because of the severe strictures passed by the Court of Appeal upon the conduct of the plaintiffs and of the Ministry of Health. No critic of 'the new despotism' could fail to seize with avidity upon such expressions as 'shocking', 'oppressive', 'really monstrous', 'an example of the very worst kind of bureaucracy', which were used by the learned Lords Justices to describe what Scott, L.J., called 'this almost incredible case'.[1] There also emerge from the judgments one or two interesting points of law.

The Minister of Health was empowered by the Defence (General) Regulations, 1939, and later legislation to requisition land for various purposes, and to delegate his powers to other authorities. By means of circulars he delegated to local authorities (including the plaintiffs) or their clerks the power to requisition dwelling-houses. (The court held that a delegation to the clerk was in reality a delegation to the local authority itself.) The B. Corporation purported to requisition L.'s house, but in breach of a condition contained in the circulars they gave no directions for the disposal of his furniture. A prospective purchaser of the house having thereupon broken off negotiations, L. re-occupied the house. The Corporation sued L. for trespass and the county court judge found in their favour, but the decision was reversed on appeal. The Court of Appeal held, (i) that the original requisitioning by the plaintiffs was ultra vires, and (ii) that a subsequent letter from the Ministry of Health, which was put forward by the plaintiffs as either (*a*) a requisitioning of the house by the Minister himself or (*b*) a ratification of the Corporation's acts, could have neither of these effects. Evershed, L.J., held that, as a matter of construction, the letter in question was nothing more than an assertion that the house had been properly requisitioned by the Corporation in the first place; and he therefore found it unnecessary to decide whether the Minister had retained any power to requisition the property or ratify the Corporation's acts, though he clearly indicated that in his opinion the Minister had not. Scott, L.J. (with whom Asquith, L.J., concurred), expressly held that the Minister had retained no such powers. The relationship between the Minister and the Corporation was not that of principal and agent; the Minister had totally denuded himself of his powers by the act of

[1] See C. K. Allen, 'Squaring the Circular', *The Spectator*, February 13, 1948.

delegation, save for such powers as he had specifically reserved to himself in the circulars.

The case should not be regarded as having established the proposition that a delegating authority is invariably debarred from resuming its statutory powers until it revokes the grant to the delegate. In *Huth* v. *Clarke* (1890), 25 Q.B.D. 391, for example, it was held that a committee of a county council could continue to exercise its power to make regulations under an Act even though it had delegated that power to a sub-committee. Indeed, in *Gordon, Dadds & Co.* v. *Morris*, [1945] 2 All E.R. 616, Lynskey, J., held that the principle laid down in *Huth* v. *Clarke* was applicable to the relationship between the Minister and Town Clerks with respect to requisitioning powers. There is, however, much to be said for the view taken by the Court of Appeal of the facts in the instant case. And, as Evershed, L.J., suggested, if both the Minister before he delegated his powers, and the local authority after he had done so, were exercising their functions 'on behalf of His Majesty', the Corporation could hardly be regarded as a mere agent of the Minister.

One aspect of the case that aroused strong comment from the court was the persistent refusal of the Corporation to disclose the full text of the relevant circulars to the defendant or his legal advisers. The court held that no legal privilege attached to these or to any other communications with the Ministry in the case. The fact that the Town Clerk was also the solicitor to the Corporation was treated as immaterial; here he had been acting as an executive officer, not as a professional adviser.

Scott, L.J., also drew attention to the fact that the Statutory Instruments Act, 1946, made no provision for the publication of sub-delegated legislation—in this instance the circulars. Now, however, the Statutory Instruments Regulations, 1947 (SI 1948, No. 1), are in force, and reg. 2 (1) (*a*) makes it clear that such documents, if of a genuinely legislative character, are subject to the provisions of the Act and are accordingly not precluded from being published. Nevertheless, legal advisers are likely to find great difficulty in distinguishing between those parts of a circular which operate as legal limitations upon the scope of the delegated powers, and those parts which are mere administrative instructions or advice to the local authority.

S. A. DE SMITH.

DELEGATUS NON POTEST DELEGARE

Allingham v. *Minister of Agriculture*, [1948] 1 All E.R. 780, is an unusual but noteworthy illustration of the functions of the courts in reviewing the exercise of delegated legislative powers. The Minister of Agriculture had validly delegated to the Bedfordshire War Agricultural Committee his powers under the Defence

(General) Regulations, 1939, to give 'directions with respect to the cultivation, management or use of land for agricultural purposes'. The committee, having decided that sugar beet should be grown on eight acres of the appellants' land, directed that the particular field to be so cultivated should be chosen by their executive officer. The officer chose a field after consulting a district subcommittee which had been appointed by the executive committee to make recommendations to it. The appellants refused to comply with the directions and were convicted, but a Divisional Court allowed their appeal on the grounds (i) that the Regulations were to be construed as requiring the committee themselves to specify the particular field to be cultivated, and (ii) that the committee had no power to delegate to the executive officer their own delegated power to specify the field: *delegatus non potest delegare*. If the executive officer had conveyed the recommendation of the subcommittee to the executive committee, and if the executive committee had then specified the field, the notice would have been intra vires.

S. A. de Smith.

WAR RISKS IN MARINE INSURANCE

In 10 Mod.L.Rev. 211 we made some comments on *causa proxima* and the construction of the phrase 'consequences of hostilities or warlike operations' in connection with the problem of distinguishing war risks from marine risks under Lloyd's policies. The case which called for these comments, *The Priam*, has now been before the House of Lords (see *Liverpool and London War Risks Association, Ltd.* v. *Ocean Steamship Co., Ltd.*, [1948] A.C. 243), which while upholding the decision of the Court of Appeal has substantially modified it in detail.

Two points are worth noticing. In the first place the House rejected the novel reading of the word 'consequences' suggested by Scott, L.J., as being contrary to the line of authority relating to this matter.

In the second place the House departed from a construction of *The Coxwold*, [1942] A.C. 691, which had been widely accepted in the insurance world. In that case a vessel while occupied in carrying war stores, *i.e.*, engaged on a warlike operation, stranded and suffered damage. This was held by the House of Lords to be a consequence of the warlike operation, a decision which created surprise, if not consternation, in the market where stranding is regarded as *par excellence* a maritime risk.

As a consequence of this decision the view arose that any casualty happening to a vessel which engaged on a warlike operation

would be held in law to be a consequence of such operation. This would furnish a simple and easily applied test. It is not really borne out by the speeches in *The Coxwold* which proceeds upon the basis (see especially *per* Lord Wright) that the problem of causation must be dealt with on lines of common sense, nor is it logically tenable. To marine underwriters, however, the common sense view of a stranding is that it is a marine peril, so that the reasoning of the House made a smaller impact than its decision.

In *The Priam* the vessel was again carrying war stores, but the damage occurred partly through the heavy deck cargo (a bridge layer in particular) breaking loose during a storm and damaging a hatch, so that water got into a hold, and partly owing to a further incursion of water through the damaged hatch consequent upon the master maintaining a zig-zag course at high speed in order to avoid a possible danger of submarine attack. Other damage was caused to the superstructure of the vessel by the heavy seas the effects of which were accentuated by the zig-zag course at high speed. The Court of Appeal regarded all this damage as consequences of warlike operations, and the market felt that its view of *The Coxwold* was vindicated. The Court of Appeal was not, however, applying any such simple rule, and the House of Lords in overruling them on the second and third heads of damage did not differ from them in their view of the law (except, from Scott, L.J., as already indicated) but only in respect of the application thereof.

Put quite shortly the view taken in the House of Lords was that the damage actually done by the bridge layer to the hatch covers was properly to be regarded as proximately caused by the war operation, but that the rest of the damage was proximately caused by the sea water, the earlier damage by the bridge layer being only a *causa sine qua non* to this. This marks a return to the classical line of authority of which *Hamilton, Fraser & Co.* v. *Pandorf Co.*, [1887] A.C. 518—the case of the rats gnawing the pipe through which the sea water entered—is such a good example. It has, however, and not unnaturally, given rise to a great deal of comment in the market when the view is taken that the Courts do not know their own minds.

In so far as this particular problem is concerned it is not likely to arise again, since as a result of *The Coxwold* a completely new and much more elaborate formula was devised which was incorporated in the Institute Clauses during the later years of the war. This in itself contains the seeds of possible future disputes which are likely to be dealt with in the light of the same general considerations as have operated in the cases under discussion.

C.

COVENANTS RUNNING WITH THE LAND

Two points of interest arose in *Breams Property Investment Co., Ltd.* v. *Stroulger*, [1948] 1 All E.R. 758. Firstly, a landlord, in negotiating by correspondence the renewal of a quarterly tenancy by a tenant, undertook that he would not terminate the tenancy for three years unless he wanted the premises for his own occupation. Then a formal but unsealed agreement was drawn up, which omitted all reference to that undertaking. Was the undertaking incorporated into the agreement? The Court of Appeal have held that it was: either the agreement and the correspondence together constitute the lease, which being for less than three years at the best rent without a fine may be created by parol agreement, or else they constitute an agreement to create a lease, evidenced in writing and therefore enforceable in equity. The first point being thus decided brings us to the second; this concerns covenants 'entered into by a lessor with reference to the subject matter', which by the Law of Property Act, 1925, s. 142, run with the reversion. For the lessor in this case sold his interest to the plaintiffs, without giving notice of the covenant not to terminate the lease for three years. The Court of Appeal have held that the covenant bound the plaintiff, for it had reference to the subject matter and so ran with the reversion. Professor Cheshire's test was approved:

'. . . it is suggested that the proper enquiry should be whether the covenant affects either the landlord qua landlord or the tenant qua tenant. A covenant may very well have reference to the land, but unless it is reasonably incidental to the relation of landlord and tenant, it cannot be said to touch and concern the land so as to be capable of running therewith or with the reversion'—*Cheshire's Modern Real Property*, 5th ed., p. 214.

It is worth noting, however, that there is good authority for saying that the rule that a covenant to renew touches and concerns the land is anomalous and hard to justify. See, for instance, Romer, L.J., in *Woodall* v. *Clifton*, [1905] 2 Ch. 257, 259. Moreover, in *Re Hunter's Lease*, [1942] Ch. 124, 131, Uthwatt, J., refused to extend the anomaly and held that a covenant by which the landlord undertook either to renew the lease on its termination or to pay £500 to the tenant, did not touch and concern the land. Now in the present case the anomaly has been extended, without reviewing the authorities. Here is not only a covenant to renew, but actually a covenant to continue renewing over a period, unless a certain circumstance, having nothing whatever to do with the landlord qua landlord, arises, *i.e.*, unless the landlord requires the premises for his personal use. What was once dubbed 'an anomaly, hard to justify', is now uncritically accepted and extended by the Court of Appeal.

D. C. Potter.

GIFTS TO THE VICAR

Re Eastes, [1948] 1 All E.R. 536
Re Flinn, [1948] 1 All E.R. 541

IT is a pity that the House of Lords in *Farley* v. *Westminster Bank, Ltd.*, [1939] A.C. 430 (in which a bequest 'to the Vicar and Churchwardens of St. Columba's Church for parish work' was held to be non-charitable and void for uncertainty), did not review the numerous authorities and overrule those which were not consonant to the rules they wished to lay down. For two more cases are now added to the list of fine distinctions. We start from an undisputed proposition: a gift to a vicar or a bishop as such is charitable, for the law presumes he is to hold the gift for religious purposes (see *Thornber* v. *Wilson* (1858), 4 Drew. 350). But where the testator says too much, where, instead of leaving it simply 'to the vicar', he adds a phrase or two explaining how the vicar is to use the money, he is in danger of expressing an intention that the vicar is to use the money for purposes which are not religious, and therefore not charitable. The law is clear and sensible on this point. Where the text expressly mentions non-charity, the original presumption that the gift was for charity is rebutted. The fine distinctions only arise when the decisions in which the law has been applied to the facts are reviewed. For what constitutes an expression of non-charity? The difficulty of answering this question may be illustrated by two cases. In the first of these, *Re Garrard*, [1907] 1 Ch. 382, the addition of the words 'to be applied by them in such manner as they shall in their sole discretion think fit' was held not to rebut the presumption of charitable intent, arising from the preceding words 'to the Vicar and Churchwardens for the time being'. In *Farley* v. *Westminster Bank, Ltd.*, on the other hand, the words 'for parish work' were held to widen the scope of the preceding words so as to include non-charities. The present two cases in the Chancery Division have given Jenkins, J., an opportunity to give a concise statement of the law on the lines set out above. In *Re Eastes* a bequest to the vicar and churchwardens of a church was followed by a long clause giving the vicar a wide power of applying the money as he chose. In *Re Flinn* there was a bequest 'to His Eminence the Archbishop of Westminster Cathedral London for the time being . . . to be used by him for such purposes as he shall in his absolute discretion think fit'. In both cases *Farley* v. *Westminster Bank, Ltd.* was distinguished, and it was held that the clause giving discretion to the priest did not enlarge the gift beyond the meaning of legal charity. A clear rule is now laid down. Gifts to diocesan and parish priests will be construed as charitable, even where a wide discretion as to their application is given, provided that no purpose is expressed which is not within the scope of charity. The present decisions have done much to clarify the law on this point.

D. C. POTTER.

THE BURDEN OF PROOF IN ADULTERY CASES

Ginesi v. *Ginesi*, [1948] 1 All E.R. 373.

In this case a husband had applied to the magistrate for the discharge, on the grounds of his wife's adultery, of a separation order, previously obtained by her against him on the ground that he had wilfully neglected to maintain her. The Court of Appeal held that, although the magistrate had decided the case wrongly on the evidence, he had nevertheless required the correct standard of proof for a case arising from adultery, *viz.*, the same degree of strictness as is required for proof of a criminal offence. A dictum of Lord Merriman was adopted as representing the law: 'The same strict proof is required in a case of a matrimonial offence as is required in connection with criminal offences properly so-called' (*Chapman* v. *Chapman*, [1945] P. 44 at p. 51). While allowing that the courts require stricter proof of adultery than is usual in civil cases, we consider, however, that this dictum goes too far and is not supported by authority. It is important to note also that the dictum was purely obiter, for the case of *Chapman* v. *Chapman* was decided on the issue of the husband's connivance in his wife's adultery, and in particular what constitutes connivance, but did not involve the question of strict proof of adultery. *Ginesi* v. *Ginesi*, therefore, is the first decision which has been based on Lord Merriman's statement of the law.

In none of the four cases relied on by the Court of Appeal is any rule similar to Lord Merriman's mentioned. Indeed, the Lords of Appeal in Ordinary in the Scottish case of *Ross* v. *Ross*, [1929] A.C. 1, so far from supporting the present view of the Court of Appeal, spoke of the proof of adultery as if it were not vastly different from the burden of proof in any other civil case. All that their Lordships meant to say was that they refused to presume an act of adultery from the mere fact that the parties were together in circumstances where adultery might easily have occurred. Moreover, in a strongly dissenting judgment, Lord Dunedin reached the opposite conclusion: that adultery could be presumed from such evidence.

Again, the case of *Rix* v. *Rix* (1777), 3 Hag.Ecc. 74, quoted with approval by the Court of Appeal, in no way supports the court's view. Admittedly, in that case, Sir George Hay said: 'Proof should be strict, satisfactory and conclusive', but it is open to doubt whether he meant that proof should be as strict as in criminal cases; and, in any case, he went on to hold, in the case before him, that adultery had been committed, although the purely circumstantial evidence before him would not have amounted to the strict proof required in criminal cases in his day, and, in fact, seems to the modern reader scarcely more conclusive than the evidence before the magistrate in the present case. The Court of Appeal cited two cases decided by Sir William Scott, who later became Lord Stowell;

but neither goes so far as Lord Merriman's dictum. In the second of these two cases, *Loveden* v. *Loveden* (1810), 2 Hag.Con. 1, Sir William Scott discussed at some length the rules of evidence in cases of adultery. He said that no universal rule could be laid down as to what kind of circumstantial evidence would be required, and went on: 'The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion; for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations, neither is it to be a matter of artificial reasoning, judging upon such things differently from what would strike the careful and cautious consideration of a discreet man'. He went on to say, what has been said in numerous cases since, that it is not necessary to prove a fact of adultery in time and place. Sir William Scott was surely not making any comparison between the burden of proof in criminal cases and in cases of adultery; he was distinguishing rather between 'guarded discretion' and 'rash and intemperate judgment', giving a warning, in short, against jumping to conclusions in these delicate matters in which people are more liable to make rash decisions than otherwise. In none of these cases is there any demand for 'proof beyond all reasonable doubt'. In one later case, however, there is a remark which seems to be an echo of the 'reasonable doubt' rule. This is the dictum of Lopes, L.J., in *Allen* v. *Allen*, [1894] P. 248, 252: 'A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of the guilt of the party sought to be implicated'. But, apart from this statement of Lopes, L.J., which was not cited by the Court of Appeal, it seems never to have been stated outright before the present case that the burden of proof in cases of adultery is equally heavy with that in criminal cases. An obiter dictum of Dr. Lushington admittedly goes far in that direction; in *Dillon* v. *Dillon* (1842), 3 Curt. 86, 116, he said: 'As far as concerns the wife, in effect, this is not a civil but a criminal proceeding, and if there be any doubt, she is entitled to the benefit of it; the evidence may perhaps preponderate in favour of the husband, but I cannot say that it is free from reasonable doubt'. It is a little odd that this remark was not cited at all in the Court of Appeal. In spite of it, however, the courts have regularly found adultery to have been proved where the evidence has not only been purely circumstantial, but also not so compelling as the type of circumstantial evidence normally required by criminal courts. If what the Court of Appeal are deciding in the present case is a well-established principle, it seems somewhat remarkable that the principle has never until now been enunciated in clear terms as the ratio decidendi

of a judgment. Moreover, it was not necessary in the present case to have compared divorce cases with criminal cases, for there are clear authorities for the proposition that, although evidence of a particular act of adultery is not necessary, yet mere evidence of the parties being placed so that they might easily have committed adultery is in itself insufficient. That would have covered this case. Evidence, too, of a course of treatment over a long period of time has been held to prove that adultery was committed at some undefined times during that period; in such cases as these it cannot be asserted that the act of adultery was proved beyond all reasonable doubt, in the sense in which that phrase has been interpreted in such cases as *Woolmington* v. *D. P. P.*, [1935] A.C. 462.

D. C. Potter.

INCOME TAX LIABILITY OF MARRIED WOMEN

The decision of the House of Lords in *Nugent-Head* v. *Jacob*, [1948] A.C. 321, was a welcome one, overruling as it did the decision of the Court of Appeal, [1947] K.B. 17, which, it had been submitted in an earlier note in *The Modern Law Review*, Vol. 10, p. 198, for which I was responsible, could not be logically supported.

The decision was concerned with the interpretation of rule 16 of the General Rules applicable to all Schedules of the Income Tax Act, 1918. By that rule:—

> 'A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried:
>
> Provided that—
>
> (1) *the profits of a married woman living with her husband shall be deemed the profits of the husband*, and shall be assessed and charged in his name, and not in her name or the name of her trustee; and
>
> (2) a married woman living in the United Kingdom *separate* from her husband, *whether the husband be temporarily absent from her or from the United Kingdom or otherwise*, who receives any allowance or remittance from property out of the United Kingdom, *shall be assessed and charged as a feme-sole* if entitled thereto in her own right, and as the agent of the husband if she receives the same from or through him, or from his property, or on his credit.'

The question was whether the private income, received from abroad, of a happily married woman whose husband was temporarily abroad fell within the first or second proviso. Both parties agreed that the husband and wife were technically living together. Macnaghten, J., therefore, held that the first proviso applied, on

the ground that they could not be both living together and separate. The Court of Appeal, however, held that the second proviso applied, because otherwise the words ' whether the husband be temporarily absent from her . . . or otherwise ' in the second proviso could have no meaning. But this construction involved construing proviso (2) as a proviso to proviso (1) and not, as it plainly was, a proviso to the general rule that a married woman is assessable as a *feme-sole*, and the House of Lords accordingly restored Macnaghten, J.'s decision. The dilemma, as I submitted in the earlier note, would be resolved if ' *living with* ' were construed in a purely factual sense. But it was to the advantage of both the parties to argue the case on the footing that ' living with ' was apt to describe a wife living in amity with her husband, although she might be compelled by circumstances to live apart from him. Lord du Parcq said, at p. 331, ' If there had been any argument to the contrary effect the problem before your Lordships might have presented a different aspect, but, even so, I see no reason to think that your Lordships' scrutiny of this perplexing rule would, in the end, have produced a different result '. In fact, it is submitted, their decision is consistent with, and would have been assisted by, a factual definition of ' living with '.

Their Lordships made short work of the unsupportable argument that Macnaghten, J.'s interpretation made proviso (2) surplusage, see my earlier note.

No one would dispute Viscount Simon's lament that the present statute law dealing with a married woman's liability to income tax is contained in so ambiguous, crabbed and involved a piece of legislation.

RAOUL P. COLINVAUX.

REGISTERED DESIGNS

Stenor, Ltd. v. *Whitesides (Clitheroe), Ltd.*, [1947] All E.R. 241

DECISIONS by the House of Lords in design cases are not frequent. Therefore, the clarification of two points arising under Part II of the Patents and Designs Acts, 1907 to 1946, by a unanimous decision of the House of Lords is important.

The registered design in this case showed a fuse to be inserted into a vulcanising apparatus for repairing motor car tyres. The fuse was of a particular shape, namely, a circular rod, the centre part of which was somewhat thicker than the two end parts and was divided therefrom by bevelled collars. The vulcanising apparatus (which was not covered by the design) had a slot with a profile allowing only fuses of the pattern shown in the design to be inserted. The vulcanising apparatus could not function until a fuse of the prescribed pattern had been inserted. The fuse was made of

metal and was about half-an-inch long. The design was registered in class 1 which comprises articles made of metal and jewellery. Evidence was produced to show that articles made of metal having the same shape, though of different size, were known on the registration date, *e.g.*, rollers for rolling mills or bicycle crank axles.

The House of Lords affirming the decisions of the lower courts, though partly on different grounds, held the design invalid on two grounds: It found that the design was not new or original, and that it constituted a mere mechanical device and was therefore not registrable.

On the first ground the House of Lords held that any article of the same shape or pattern coming within the same class constituted an anticipation, even if it came within an entirely different commercial category or type of goods and was used for an entirely different purpose. Since crank axles for bicycles and rollers for rolling mills were made of metal, and since the fuse in question was made of metal and classified in class 1 covering metal goods, the prior use and publication of the axles and rollers, in the view of the court, deprived the shape of the fuse of novelty and originality. Conversely, it follows from this decision that if the fuse had been registered before the axles or rollers were used or published (and if the registration of the fuse had not been invalid for other reasons) the registered owner of the fuse design could have prevented the sale of axles or rollers of the same shape. On the present wording of the Acts and the Classification Rules published under section 86 by the Board of Trade, this decision is undoubtedly correct. The result is, however, inequitable. Accordingly, the Patent Law Reform Committee, in its Final Report of September, 1947, Cmd. 7206, paras. 289 to 295, has recommended abolishing the classification of registered designs. Part I of the Patents and Designs Act dealing with patents does not provide for any classification. The same is now suggested for registered designs. The Committee recommends that the owner of the design should be required to specify the particular article in respect of which he desires registration of the design, and his copyright in the design should be limited to articles so specified and articles of similar description, having regard to their general character and use. If this recommendation is enacted, prior publication or use of the same pattern for a different type of article would no longer constitute an anticipation.

The second ground of the judgment is based on the definition of 'design' in section 93 of the Patents and Designs Act, reading as follows:

> Design means only the features of shape, configuration, pattern or ornament applied to any article . . . which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction, or anything which is in substance a mere mechanical device.

The court found that the fuse in this case was given the

particular shape for the purpose of performing a mechanical function, namely, to make the vulcanising apparatus work. The shape of the fuse was not designed to appeal to the eye but to operate mechanically, much in the same way as a key of a yale lock is cut to a particular pattern for the purpose of operating the lock. Therefore, the fuse in question did not come within the definition of ' design ' as set forth above and was not a proper subject for registration under Part II of the Patents and Designs Acts. The removal of the design from the register was ordered.

It is interesting to note from the report that apart from the registered design the plaintiffs had been granted a patent for a vulcanising apparatus comprising a fuse identical to that shown in the registered design. Evidently the fuse alone was not patentable because it contained no new technical features. Anybody could therefore make and sell fuses to be used with the patented vulcanising apparatus. The plaintiffs had tried to secure for themselves a monopoly on a continued supply of fuses to users of their apparatus by providing the slot which took only fuses covered by the registered design. Under section 38 of the Patents and Designs Act a contract binding the user of a patented article to purchase unpatented accessories from the patentee only, is unlawful. The plaintiffs tried to circumvent this provision by registering the fuse as a design. This aspect of the case is not dealt with in the judgments. The strict interpretation given by the House of Lords to a registrable design—as distinct from a mechanical device—has, however, put an effective stop to this attempted abuse of monopoly.

Peter Meinhardt.

PATENTS

Raleigh Cycle Co., Ltd. v. *H. Miller & Co., Ltd.*, [1948] All E.R. 308

The patent in this case covered an electric dynamo set for lighting a bicycle in which the dynamo is fitted in the hub of the wheel and gives a steady light even at slow speeds.

Previously it had been thought that a frequency of fifty pulses per second was necessary to produce a steady non-flickering light for a cyclist. Therefore, dynamo sets had always comprised a small wheel on the dynamo driven by the larger outer rim of the tyre by means of friction, thus producing a gearing effect. This construction had many disadvantages, such as a braking effect on the wheel and damage to the tyre. The idea had been mooted to build the dynamo into the hub of the wheel, but had been discarded on the ground that the dynamo would then rotate too slowly to give a steady light.

The patentees discovered that from the point of view of the cyclist there was a sufficiently steady light reflected on the road if the dynamo operated at twenty pulses per second. They designed

and described in a patent specification a lighting set with the dynamo fitted in the hub. The Raleigh 'Dynohub' constructed in accordance with the patent was an immediate technical and commercial success.

The defendants produced a dynamo set which, except for very minor details, was a Chinese copy of the patented construction.

Claims 1 to 4 of the patent covered 'an electric generator for a cycle comprising a multipolar annular permanent magnet and a wound multipolar armature mounted within the hub of the cycle wheel . . .'.

Claim 5 covered 'an electric generator for a cycle, constructed, and arranged substantially as herein described, with reference to and as illustrated in the accompanying drawings'.

All the courts found that the patent had been infringed by the defendants. The Chancery judge, the Court of Appeal and the minority in the House of Lords held the patent invalid, but the majority in the House of Lords held the patent valid and gave judgment for the plaintiffs.

The Chancery judge held that the patent lacked 'subject-matter', *i.e.*, an inventive step. The Court of Appeal and the House of Lords, however, came to the conclusion that the construction invented by the patentees involved ingenuity. According to the judgments of the higher courts the fact that the idea of a dynamo fitted into the hub had been mooted before by several designers, but had been discarded as impracticable, coupled with the commercial success of the 'Dynohub', proved that the solution found by the patentees was not obvious.

The Chancery judge went out of his way to find flaws in the specification and claims of the patent. He raised the point—not taken by counsel for the defendants—that the word 'cycle' was ambiguous; with the help of Fowler's *Modern English Usage* and the *Oxford English Dictionary* he searched into the various meanings of the word 'cycle', and came to the conclusion that it was 'a most unfortunate and unsatisfactory word to have been introduced into a patent specification' in order to describe a 'pedal bicycle'. This view was overruled in the higher courts, but it shows significantly the over-critical attitude adopted by some Chancery judges towards the wording of patent specifications.

The Court of Appeal and the minority in the House of Lords held the patent invalid because the patentees had claimed a novel construction for a dynamo set giving a steady light, but had failed to explain properly that by 'steady light' they meant a light of only twenty pulses and had failed to make it clear that the gist of their invention lay in the fact that such a light was sufficient from the point of view of the cyclist. They held, accordingly, that the patentees had failed to do what they had promised to do, and that the patent was bad on the ground of 'failure of consideration'.

On the other hand, the majority in the House of Lords found

that the patentees had stated sufficiently clearly that by ' steady light ' they meant a light of twenty cycles, and that they ' had given the cyclist what they had aimed at giving him—an improved construction and a satisfactory light '.

The most interesting part of the decision concerns the claims. All judges were agreed that claims 1 to 4 were bad because they referred to a ' multipolar ' dynamo. This expression was found to embrace any dynamo having more than four poles, and the experts said that a dynamo with substantially less than twenty poles would not give the promised steady light.

Claim 5, however, did not contain the offending word ' multipolar ', but referred the reader to the specification which described and the drawings which showed a generator with twenty poles. This claim was, therefore, held valid by the majority in the House of Lords.

A claim of the type of claim 5 in patent parlance is known as an ' omnibus claim ', because it does not set forth individual technical features but refers the reader generally to the specification and the drawings. Such a claim had been held valid by the House of Lords in *Hale* v. *Coombes* (1925), 42 R.P.C. 328, but in recent years doubts had been expressed by patent draftsmen whether such a claim was really entitled to protection. The House of Lords has now re-established the importance of an omnibus claim. Obviously, it will give protection to a patentee only if the infringer produces a Chinese copy or very close imitation of the patented device.

Raleigh v. *Miller* breaks a chain in a long series of decisions by the Court of Appeal and the House of Lords holding patents invalid or not infringed (or both). Some members of the Patent Bar and some Patent Agents herald it as the turning point towards an interpretation of patent specifications and claims more favourable for a patentee than hitherto practised by the superior courts. Others are less sanguine and see in the decision merely a narrow victory for the patentees on a doubtful point. It will be interesting to see how the lower courts will apply to future cases the principles laid down in this decision by the House of Lords.

PETER MEINHARDT.

REVIEWS

Federal Protection of Civil Rights—Quest for a Sword. By Robert K. Carr. [Cornell University Press, Ithaca, New York. 1947. England: Geoffrey Cumberlege, at the Oxford University Press. xii and 284 pp. 16s. net.]

In 1939 a Civil Liberties Unit was set up in the United States Department of Justice for the purpose of providing machinery for the positive enforcement of civil liberties, or, as the Federal Attorney-General put it, 'the aggressive protection of fundamental rights' by the pursuit of 'a programme of vigilant action in the prosecution of infringement of these rights'. The purpose of this book is to give some account of the working of this section.

The idea of such a positive approach to the problem of preserving civil liberties must seem a welcome innovation to all who regard this branch of the law as of fundamental importance, and they will take up Professor Carr's book with eager anticipation. Alas, after an encouraging introduction the narrative tends to fade away into a mass of padding. The truth seems to be that the jurisprudence on this branch of the activity of the Federal Department of Justice has not yet been developed sufficiently to provide material for such a substantial volume: as Professor Carr himself admits, 'the number of criminal prosecutions the Civil Rights section has been responsible for since its creation in 1939 is phenomenally low'.

The conception of civil liberties among American lawyers is distinctly wider than that which prevails in this country, extending particularly to justice enforcement; the protection of citizens in the exercise of their political rights over a wide field, as in connection with the control of primaries in Presidential elections; the prevention of racial discrimination and like matters. Moreover, as Professor Carr says, 'government was the enemy of freedom', and since in America there are numerous States each with its apparatus of government and with numerous officials, often recruited under the spoils system, it is obvious that there is a wide field for possible Federal control for the enforcement of civil liberties. These problems have, in fact been very much more often before Federal Courts in America of recent generations than they have in this country, and the prima facie need for an 'aggressive' policy of enforcement, for the provision of a 'sword', so to speak, as opposed to a 'shield', seems to be made out. Since so many of the lines along which these difficulties occur in the United States are not found in England, it seems very questionable whether any useful purpose would be served by the setting up of similar machinery here.

The Federal Courts, however, can only exercise jurisdiction by virtue of statutory enactment within the limits of the constitution, and this has proved exceedingly limiting from the point of view of the Civil Rights section: a couple of sections in the Civil Rights Act relating to conspiracies, and to wrongful deprivation of rights, and the Peonage Abolition Act, are all that is available to found jurisdiction.

The appeals which have been brought before the Supreme Court have found the members of that august tribunal very much in two minds as to the correct policy to adopt, and the study of the reactions of the different justices who have passed upon these cases is perhaps the most interesting aspect of this book. The court has, during the period under review, been, on the whole, liberally constituted, but it has shown itself very reluctant to entertain proceedings for the purpose of enforcing the above enactments. Moreover, almost all the judges who have passed upon these cases seem to have changed their minds from one case to another.

This attitude, if unfortunate, is not altogether to be wondered at. Almost all these judges are men who would naturally have a civil liberties bias, and most of the few cases have been of the type which arouse strong feelings. Nevertheless the enactments to be applied are vaguely worded and date from the period after the civil war, when a good deal of Federal legislation was passed which is now suspect. It is not surprising that the justices should be reluctant to build up a jurisprudence directed against State rights upon such a slender foundation.

Professor Carr thinks that if the C.R.S. is to prove a success it must have a much firmer platform for action. This could be provided by constitutional amendment, but such is obviously not likely to be forthcoming, and he invites the Supreme Court to supply it by judicial interpretation. New and comprehensive civil liberty legislation would obviously be of assistance to the court, and Professor Carr calls for it strongly.

This volume is the second of a series of *Cornell Studies in Civil Liberty*. It is good to see that this university, which has been a centre of the Civil Liberties Movement in recent years, is continuing its good work.

C.

THE CIVIL SERVICE IN THE CHANGING STATE. By H. R. G. GREAVES. [London: Harrap & Co., Ltd. 240 pp. (with index). 10s. 6d.]

MR. GREAVES has written an important book, and one which should be pondered by a much wider public than the students of the machinery of government to whom it is primarily addressed: among these not least by lawyers. The changing role of the civil servant in modern England has often been commented upon both with praise and blame, and the importance of the development has been universally acknowledged, yet no one has, until Mr. Greaves, sat down to make the full-dress study which the situation so obviously demanded. He has accomplished his task with knowledge and with judgment, and his work is likely to command attention for many years.

What Mr. Greaves is concerned with is the role of the civil service in the planned economy of the modern State, using the word economy in a wide sense. The State is providing, and is going to provide still more in the future, a wide range of services for the public. Equally on the more purely economic side it is going to superintend and control production and distribution a great deal more than has been the case since Tudor times. It is even, through public service corporations, going to assume responsibility indirectly for much of the actual production. Since the State functions through the civil service this means that that service has expanded and is expanding rapidly and is confronted with tasks and problems of a quite novel character.

Those facts obviously raise another set of problems concerned with recruitment, training, and especially with the control of departmental policy and functioning, which are not only intricate and intractable in themselves, but the successful solution of which is vital to the life and well-being of the people. Too much thought can hardly be given to such matters, and it is to be hoped that this book will stimulate an intense discussion both inside and outside the civil service.

Mr. Greaves' opening chapters are concerned with the service as it exists today. In order to assess its present abilities and potentialities he investigates the social situation which it was built up to handle, and how the building up was successfully carried out on the advice of Sir Stafford Northcote and Sir Charles Trevelyan. The fundamental of their reform was to substitute an absolutely impartial method of recruitment for the old system of patronage. One of the major practical issues raised in this book is that of recruitment for the public service corporation which at present goes too much by favour,

and in respect of which there is cause for public concern. Too much attention can hardly be given to Mr. Greaves' sensible comments upon this matter.

After this assessment there follows an important chapter on the Public Service Corporation as a type of Government organisation, the substance of which appeared in this Review (see Vol. 7, p. 42). Having thus described and assessed the civil service and the problems with which it is confronted, which are, indeed, the main problems of the modern State, Mr. Greaves comes to the heart of his discussion, which is the provision and organisation of the necessary leadership. This is, of course, the Treasury. He undoubtedly puts his finger upon one of the crucial difficulties here. The Treasury's role as controller of the civil service is only a by-product of its main departmental functions. He is certainly right in calling for a new conception of the Treasury's function, if not a new department directly under the Prime Minister working, perhaps, through a Minister of State, or other strong political lieutenant.

It may be doubted whether Mr. Greaves has quite sufficiently gauged the hostility which such proposals will undoubtedly arouse in the other departments. Yet it is undoubtedly true that in the battle for the new Britain the various units of the army fight independently, save for occasional timid intervention by the Treasury, and such co-ordination as committees of overworked and harassed Ministers may from time to time bring to bear. It took a long time to obtain the appointment of a Minister of Defence for the purpose of co-ordinating the activities of the armed forces, it will take longer still to obtain adequate central control of the ministerial departments.

Mr. Greaves goes on to describe the machinery by means of which such central direction could be achieved. His suggestions are fertile, and his discussions stimulating. It is to be hoped that his work will attract the attention of those who carry the supreme authority for directing the affairs of the nation at this crucial time.

C.

Rediscovery of Justice. By F. R. Bienenfeld. [London: George Allen & Unwin, Ltd. 1947. 240 pp.; bibliography and indices, 241–263.]

This is an interesting work intended not only for legal experts but also for the enquiring layman. For this reason the author has resisted the temptation to annotate the text, which certainly makes the book easier to read. The style is pithy, epigrammatic and clear.

The book is significant in that it reveals that even a writer with the psychoanalytical approach finds it difficult to avoid the terminology of natural law. The author begins by a psychological study of the family unit, illustrating the contradictory demands made by each of its members. Each child leans to one or other of these demands, according to the needs of the moment. Justice is not a system of ideal rules, but an eternal method of social economy in the use of force: it tries to reconcile the conflicting demands with some consideration for the rights of all. No one demand can ever be completely satisfied.

This approach is then projected into the nation state and finally into the international sphere. The search is for rules of natural law which can be made the basis of an international bill of human rights. But the author is not seeking immutable rules—natural law is relative to time and place and consists of those values actually accepted by the community in question. 'The crucial question of all jurisprudence whether and when justice is superior to law, may now be answered on the basis of the theory of the relativity of natural law: any national legal system which infringes principles of natural law as recognised and considered self-evident in a particular period of evolution produces no law at all, but conceals a crime beneath a facade of legality.' This doctrine he uses in defending the charge of crimes against

humanity brought at the Nuremberg trial. The laws of Germany which authorised such acts were invalid.

The book is reminiscent of many other writers, but it is doubtful if all the strands can be easily woven together—Radbruch's relativism: the influence of the mediæval theory that natural law determines the limits of positive law: Pound's social engineering and jural postulates: modern psychology: realism in the sense that the author is concerned to examine the facts. The author is modest in the formulation of the international bill of rights, for he recognises that public opinion is not yet sufficiently developed to allow him to say that there are many 'natural laws' operating in this sphere.

Can we apply to society the analysis of the individual in terms of psychoanalysis? In a certain sense we can, for society is just a mass of individuals, each with these particular demands. But to the solution of certain problems, the purely psychological approach (as manifested in this book) leads to a dangerous simplification, and we must be careful not to be led astray. Then when we come to the international sphere, it may be a useful analogy to talk of a 'fatherless' society—but it must not be pushed too far. Again, China may be an 'adolescent' from the angle of the political development of the modern state, but in other respects her way of life shows an inherited wisdom and a culture developed over centuries. Again, there is a tendency to try and obtain the best of both worlds. Justice is relative: but laws opposed to this relative justice are invalid.

The work, however, is certainly stimulating and is couched in a form which should interest a wider circle than the legal profession in what is certainly the greatest problem of our time—the creation of an international community in the real sense of the word.

G. W. PATON.

COMMON SENSE IN LAW. By Sir PAUL VINOGRADOFF. Second edition, revised by H. G. HANBURY. [Geoffrey Cumberlege. Oxford University Press. H.U.L. 1946. 192 pp. 3s. 6d.]

IN his introduction Dr. Hanbury calls this book 'a gem, a little classic', and has disavowed any intention of bringing the original edition up to date, only making alterations where the text has become incorrect. No one will deny that this is the proper course, but such restraint in editors is nevertheless rare. The book is a small-scale map of a very large area and yet, despite the omission of detail, gives the intending traveller an excellent idea of the nature of the terrain. To quibble with statements by the author because, being generalised, they are not wholly accurate is of little value. The book is written for those who want a simple introduction to the nature of law; oversimplification is therefore a fault only where it misleads and not where it merely results from the absence of detail.

After rejecting Ihering's 'delimitation of interests' as the end of law on the ground that the function of the State is 'to see that the wills of the members of the community do not clash while striving towards the attainment of their ends' and 'to lay down and enforce the rule of the road', and after denying that social policy can be 'the essential element of legal arrangements', the author stated: 'The aim of law is to regulate the attribution and exercise of power over persons and things in social intercourse'. A few pages later law is defined as 'a set of rules imposed and enforced by a society with regard to the attribution and exercise of power over persons and things'. Our young reader may be a little disappointed when he sees that the author is saying, in effect, 'the aim of law (in my definition) is to be law (in my definition)'. Law, however defined, exists in the factual world. The aim of law, on the other hand, exists in the world of opinion and ideas.

Again, at the outset of the chapters on sources, our innocent will read: 'To begin with it seems clear that a law may be either *made* in advance for

the express purpose of regulating future events or else *declared* by courts of justice in exercise of their jurisdiction. Herein is the fundamental distinction between *legislation* and *judge-made* law'. Custom is then called an aspect of the latter and is defined as 'legal rules based on traditional usage and declared in popular courts: the customs observed in the borough courts of Southampton or of Nottingham, for instance'. The author thus first makes a distinction between laws which are *made* and those which are *declared* (his italics), a misleading over-simplification in itself; then he immediately refers to judge-*made* law, and the mind of our innocent may stagger. Customs are 'declared in popular courts' and the examples given are those 'observed in the borough courts'. Does this mean, the learner may ask, certain procedural differences in these local courts or does it mean certain differences in the law itself which are recognised in those courts? If the former, is this the limit of the scope of custom and is this why it is called judge-made law? If the latter, are these local courts then *popular* courts?

To write an introduction to the nature of law in two volumes is so much easier than to contain it within two hundred pages. Most authors can (and do) explain what they mean at length; the brilliance of this book is that it manages, despite certain misleading over-simplifications, to explain so much so well in so few words.

J. A. G. Griffith.

The Allied Military Government of Germany. By W. Friedmann, ll.m., dr.jur. [London: Stevens & Sons, Ltd. x and 362 pp. (with index). 25s.]

This is not a book primarily about the legal aspects of military government in Germany. The author is, however, a distinguished lawyer whose work on this *Review* is well known, and the legal is not the least important side of military government so that some account of this important volume may prove of interest to our readers.

Professor Friedmann not only played his part in the preparations for the allied administration of Germany, but afterwards held important posts on both legal and economic sides. He therefore speaks with authority. His book, moreover, is well documented, and contains a particularly valuable set of appendices in which almost every law, pronouncement and ordinance of real importance is set out, together with relevant statistical information, typical political and administrative documents, and much other apposite material. It is likely therefore to remain an authoritative work on its subject until such time as the episode can be dealt with in historical perspective.

One may, perhaps, be permitted to make one further point of general import. Professor Friedmann was a victim of the Nazi régime, but although he has developed an obvious affection for the land of his adoption, he has not lost a genuine devotion to the country of his birth. He clearly feels very deeply the miseries which the allied administration has been able to do so little to alleviate, but has nevertheless succeeded in maintaining a strikingly objective attitude. His comments, for example, on the thorny subject of denazification, which is so apt to arouse here sentimentality, whether of the callous revengeful, or the sickly sloppy, type as to be hardly capable of rational discussion, are a model of sound reasoning and common sense.

I do not propose to set out in detail the topics with which Professor Friedmann deals. He naturally discusses all the main aspects of military government; the constitutional problem, the rebuilding of the administration, political and social reconstruction, the restoration of law and justice, and the educational and economic problems. These chapters form the substance of the book, though they are preceded by a number of chapters in which the background to the problem is sketched in in masterly fashion, and are succeeded by a series of chapters in which Professor Friedmann analyses profit

and loss, and assesses future prospects. Although here and there one has the impression of haste the book is remarkably well constructed, and attractively written.

It is unlikely in the conditions of the modern world, and in the situation created by a modern war that one great nation will ever again successfully govern another, as was possible with the French in the time of Napoleon or with the British in India for many years. When four of them make the attempt together one should expect chaos. The astonishing thing is not that the experiment has been unsuccessful but that the disaster has not been much more complete. As Professor Friedmann says, 'the government of a defeated country demands an exceptional combination of qualities. The incentive to discipline created by danger is replaced by the consciousness of absolute power and the easy availability of loot'.

Nevertheless it has been the American and, though to a lesser extent, the British, Governments' policy to shed this absolute power as quickly as practicable. Professor Friedmann shows how German responsibility has been built up and how the result of this has been an increasing responsiveness on the part of the Allies to German democratic opinion. Indeed, in some spheres, such as that of education, where the German tradition is particularly conservative and bourgeoise, the effect of handing over power to the Germans may well have seriously reactionary consequences.

The chapter on the restoration of law and justice is one of the shortest in the book. This is no doubt because this has been one of the outstanding achievements of military government. Plans had been carefully worked out before invasion, and could be put into operation with less modification than in other spheres. In no aspect of their régime had the Nazis evoked a more widespread hostile reaction than to their police system and their administration of justice. Yet wide cadres of the old professional magistracy were available to man the courts. The result has been a rapid re-erection of the framework of justice, though internal conditions remain unsettled, and the volume of crime is very disturbing. Professor Friedmann's complaint here is that the armies of occupation are not equal with German citizens before the law. But this seems rather a Utopian attitude in the actual circumstances of the occupation.

C.

The Trial of Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany. [H.M.S.O., 1947. Part 9, 364 pp., 5s. 6d.; Part 10, 332 pp., 5s.; Part 11, 388 pp., 7s.; Part 12, 444 pp., 7s. 6d.; Part 13, 372 pp., 6s. 6d.]

These five volumes of the Nuremberg proceedings cover the period March 12 to May 13, 1946. In that space of time the Tribunal was concerned with the individual defences of Goering, Hess, Ribbentrop, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Funk and Schacht, and began hearing evidence on behalf of Dönitz.

Those who are desirous of learning something of the Rise and Fall of the Nazi Empire need do no more than read through the oral evidence given by Goering on his own behalf, for he was in the Party from the early days, having met Hitler in 1922 and taken part in the Munich *putsch* in 1923, although at the end it appears that he was no longer of the Party, having been arrested in April, 1945 (Part 9, pp. 63–210, 232–338).

Comparisons are often drawn between the International Military Tribunal at Tokyo with that at Nuremberg, but in comparing the protection accorded to the rights of the accused one is left with the impression that at Nuremberg the defence was treated with the greatest possible consideration. At Tokyo, if the newspaper reports are correct, the defence appears to have been

hampered by the Tribunal; thus, an adjournment was refused after one of the defending counsel, conducting the examination-in-chief of a witness, had been suspended for objecting to what he considered the unwarranted interference of the Tribunal in telling him to confine his examination to matters raised by the prosecution. At Nuremberg, on the other hand, the rights of the defence were fully protected. During his cross-examination of Goering, Mr. Justice Jackson produced a document which had not been shown to the defence. Defending counsel objected to the admission, but was overruled on the basis of the value of surprise in cross-examination. Counsel then asked for a general ruling that ordinary documents should be made available. Mr. Justice Jackson commented on this: 'Frankly, I do not know whether we have adequate copies to furnish them to all the defence counsel now'. The President's reply to this was 'Maybe you have not, but you can let them have one or more copies' (Part 9, pp. 238–9).

Part of Hess's defence was based on the alleged injustices of the Treaty of Versailles, largely on the grounds of duress and its incompatibility with the Fourteen Points. It was contended that duress made the Treaty incompatible with international law; but a peace treaty has never been impugned on the grounds of duress, for this is always present between victor and vanquished. To invalidate a treaty, duress must be of a personal character exercised against the negotiator. The court held these arguments on Versailles to be completely inadmissible.

It is by now well known that post-1945 practice in the trials of war criminals has been to admit evidence which in the normal way would be completely inadmissible. Thus Schacht, in his own defence, was permitted to report to the court what Speer, another of the accused, had told him had passed in a conversation between Hitler and himself. (Part 12, pp. 442–3.)

The bulk of the material in these volumes is completely factual and merely relates to the personal anticipation of individual defendants in the various incidents that took place in Nazi Germany. Although these particular volumes may not be of outstanding value to the lawyer, they will constitute, with the remainder of the Nuremberg documents, the full record of what may well come to be regarded as one of the most outstanding cases in international law.

L. C. Green.

Law Reports of Trials of War Criminals. Vol. 2, 'The Belsen Trial'. [Selected and prepared by the United Nations War Crimes Commission. H.M.S.O., London. 1947. 156 pp. 3s.]

The second volume of the *Law Reports of Trials of War Criminals* is devoted to the consideration of the first large trial of personnel employed in German concentration camps.

The *Belsen Trial* was of forty-five accused, of whom twenty-one were women, led by the notorious Josef Kramer, for atrocities perpetrated at Belsen, Auschwitz, or both. It was not an international trial in the Nuremberg sense, for it was heard by a British military tribunal instituted under the Royal Warrant of June 14, 1945, and the accused were defended not by civilians, but by British or Polish serving officers. A British military court was established because the victims at the camps represented ten allied nationalities and the accused were in British hands, having been captured at Belsen when the British forces overran that camp; it was considered, therefore, that the most practical course to adopt was to instal a British tribunal, with representatives of the allied nations affected—together with a representative of the World Jewish Congress, for most of the victims, especially at Auschwitz, were Jews—attending as official observers.

If any proof were needed of the extent to which Nazi philosophy had

affected German youth, this trial would provide it, for many of the accused were young persons between 18 and 25 years old. In fact, one offered the defence that he was too young and too weak to have committed murder.

In their defences the accused usually denied the allegations against them; called the prosecution witnesses liars; pleaded mistaken identity, claiming that they were never at the camps; or confessed that they indulged in minor face slappings. Perhaps the most amazing plea of all was that put forward by Francioh, who said he 'could have escaped. . . . He was so fond of the prisoners, however, that he thought it was his duty to stay and look after them' (p. 50). He fulfilled this duty so well that the court sentenced him to be hanged.

Colonel H. A. Smith, at that time Professor of International Law in the University of London, appeared on behalf of all the accused, and raised the plea of superior orders. He argued that the *Manual of Military Law* as unamended was a correct statement of the law, and the change, published in April, 1944, and based on the sixth edition of *Oppenheim,* was not good law (pp. 77–8). This defence could not cover any of the ill-treatment that occurred at Belsen, for the defence agreed that the beating of prisoners was illegal, even according to the law of Nazi Germany. At Auschwitz, on the other hand, the gas chambers were installed, apparently, on Himmler's orders, and Colonel Smith, therefore, contended that the accused had a valid defence in that they merely carried out the orders of their superiors. He seemed to imply that it was the amendment to the *Manual* which denied the validity of the defence of superior orders, completely ignoring the precedent of the *Llandovery Castle,* 1921. In this connection he implied that legality by municipal law was a valid defence in the eyes of international law, but this is to ignore the fact that international law has never recognised the defects of municipal law as a valid justification for inaction or illegal action according to international law; for, as was pointed out in the *Alabama* Arbitration, a government 'cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed'. Since the liability of a State arises from the acts of its subjects, it must be equally true that if the subject is charged under international law he cannot raise the 'insufficiency' of his national law as a justification for his actions.

It is a little strange to find that Colonel Smith argued that because one of the belligerents, during the course of the war, occupied enemy territory and declared it to be annexed, the other belligerents, and also a tribunal bound to apply international law, were obliged to recognise this state of affairs, so that persons living in such territory would have become German nationals, with the result that atrocities against them could not be regarded as war crimes. The tribunal, on the advice of the Judge Advocate, who, despite the statement on page 137, is not the legal member of the tribunal, rejected all these pleas raised by Colonel Smith.

Another point of interest to lawyers was the plea raised by the Polish officer on behalf of certain Polish accused that, insofar as they persecuted Polish citizens and others, they could not, because of their Allied nationality, be guilty of war crimes. To accept this plea would be to grant a privileged position to any traitor or neutral subject serving in, or on behalf of, the enemy's forces.

Of similar interest was the admission of unsigned affidavits, and even ordinary letters, as evidence in accordance with the terms of the Royal Warrant. Evidence was also admitted of atrocities against Hungarians and Italians, and of similar activities carried on by the accused at other camps—thus Kramer confessed he had gassed prisoners at Natzweiller (p. 40)—the justification being that such evidence tended to show that the accused were in the habit of behaving in such a way to the prisoners in their charge and that Belsen and Auschwitz were not isolated incidents, but part of a common and concerted plan to ill-treat and exterminate prisoners, especially Jews.

It must not be forgotten that there may be more than a little truth in the

suggestion put forward by Major Cranfield, defending officer of Irma Grese and others, 'that the accounts of incidents which had been put forward by prosecution witnesses were very probably a confused telescoping together of experiences undergone by them during the whole of their time in concentration camps. When accusations had to be made at Belsen there were only a limited number of S.S. personnel to accuse. A large number had gone away, and when these witnesses, having suffered so much, were given the opportunity of accusing somebody, then the incident, probably telescoped, had to be pinned on to one of the people available in custody' (p. 87).

Probably of more lasting value to the rules of international law in connection with the punishment of war crimes than the résumé of the *Belsen Trial* is the collection of notes contributed by the staff of the United Nations War Crimes Commission dealing with such matters as the charges, the evidence, the pleas, the law involved, and any other matters of interest or importance that arose during the trial. When the series is complete these notes will constitute a valuable commentary on the practice of war crimes trials after 1945.

L. C. Green.

Paget's Law of Banking. Fifth edition by Maurice Megrah. [London: Butterworth & Co. (Publishers), Ltd. 1947. xlvii and 446 and 50 pp.]

This is the first edition of this remarkable work for which the author is not responsible. The late Sir John Paget, K.C., already an old man, produced the fourth edition in 1930, since when there have been a substantial number of decisions of the first importance, so that Mr. Megrah has had a responsible task. As secretary of the Institute of Bankers, and the author of a workmanlike book on bills of exchange, he is exceptionally well qualified for the task which he has discharged with competence.

Before discussing a few of his more important additions I should like to make a few general remarks on the volume as a whole, party because this is the first occasion upon which the work has been discussed in the *Review*, and party out of respect to Sir John Paget, who undoubtedly achieved outstanding eminence as an authority on the law of banking.

In one sense the law of banking is an unusually narrow subject, for there is very little English law concerned exclusively with the business of banking. On the other hand bankers are much more closely concerned with one branch of the law merchant, that is the law of bills of exchange, than is any other section of the community. And again, many of a banker's activities bring him closely into touch with those branches of the law which regulate such activities, notably with all that relates to securities for loans. In this way the law of mortgages, for example, becomes part of the law of banking. In another sense then, the subject covers a very wide ground.

The author of a textbook on the subject is accordingly faced with difficult problems of selection and emphasis. He is obviously under the necessity to discuss in full detail matters which are peculiar to bankers, but on other topics he must exercise discretion lest he find himself, when discussing securities, embarked upon a full scale treatise on, for example, mortgages. These difficulties have not always been satisfactorily surmounted. Sir John Paget's long experience as counsel to the Institute of Bankers gave him a valuable insight as to how far it was useful to go in these matters, and guided him as to the emphasis required in discussing the manifold complexities of bills and cheques. Even he, however, did not achieve a uniform excellence, and his chapters on securities are in some respects far from adequate.

His work was throughout marked by vigour of mind and the fearlessness of a strong personality. With a grasp of his subject which it has fallen to few

even of the most eminent judges to possess, and a robust self-confidence in the value of his own opinions, Paget was never afraid either to express a view on a point which had not yet come up for decision or to criticise the soundness of judgments already given. On a number of occasions his views were subsequently accepted by the courts, than which no stronger testimony to their accuracy could be desired.

It may finally be observed that Paget was writing for practitioners, and for practitioners experienced in the subject-matter of his work. His book, therefore, is quite unsuitable for students approaching the subject *ab initio*, or indeed for qualified lawyers, unless they are prepared to embark upon a serious study of the subject.

It is very pleasing to observe that Mr. Megrah has entered upon his task in the spirit of Paget, though he has not perhaps acquired the self-confidence of his master. It is not difficult to see that he does not regard *Savory* v. *Lloyds Bank, Ltd.*, [1933] A.C. 201, as achieving the acme of judicial wisdom, but his comments lack the pungency which we should have expected from Sir John Paget. He has incorporated the recent cases with a due regard to the organic character of the work, and I have been able to find little with which I am not in agreement, though I am not convinced that after *Carpenters' Co.* v. *British Mutual Banking Co., Ltd.*, [1938] 1 K.B. 511, it is now clear that section 19 of the Stamp Act, 1853, was repealed by the Bills of Exchange Act, 1882.

Mr. Megrah has apparently overlooked a few cases which are of importance, as *Penmount Estates* v. *National Provincial Bank* (1945), 173 L.T. 344, and *South African Reserve Bank* v. *M. Samuels & Co., Ltd.* (1931), 40 Ll.L.Rep. 291.

I hope that this is only the first of a number of editions for which Mr. Megrah will be responsible, and I would like to suggest to him that he should pay special attention to that part of the work which deals with securities for advances, which I have already alluded to. These three chapters need recasting and rearranging, and some parts require extensive rewriting; there ought, for example, to be a separate chapter or section on mortgages. Moreover the rather inadequate discussion of bankers' documentary credits, one of the greatest inventions of modern commerce, is broken up over various sections. Perhaps Mr. Megrah could give us a really good new chapter on this subject next time?

SYKES' BANKING AND CURRENCY. Ninth Edition. By the Author. [London: Butterworth & Co. (Publishers), Ltd. xiv and 247 pp. (with index).]

THIS little book, now in the forty-third year of its life, still provides a useful introduction to the mechanics of banking and currency which can be profitably read, but with caution, by those wishing to obtain a background before embarking upon the study of the law of banking. One needs caution because the legal side is very sketchy, not always accurate, and leaves out of account some of the most important modern decisions.

C.

A SIMPLE GUIDE TO NEGOTIABLE INSTRUMENTS AND THE BILLS OF EXCHANGE ACTS. By DUDLEY RICHARDSON. [London: Butterworth & Co. (Publishers), Ltd. 1948. vi and 182 and 7 pp.]

THERE are more competent elementary textbooks on bills of exchange than on any other branch of mercantile law, and only something exceptionally good

would justify a new one in these difficult times. This volume is certainly not that exception, and we doubt whether a student attracted by the promise of simplicity contained in its title will agree that the complicated subject has been made clear.

Mr. Richardson begins with an introductory section in which he discusses common law and equity, choses in action, and the general principles of negotiability. This is very sensible and except that the first of these chapters is not very illuminating contains some helpful explanation.

When discussing bills of exchange, Mr. Richardson takes the student through the Act section by section, which is a time-honoured and reasonably effective method. It results, however, in an absence of discussion of general principles, and, usually, a failure to paint in the necessary background; yet only by adequate attention to these matters can the clarification aimed at on behalf of the beginner be achieved. There is, for example, no attempt to explain the general relationship of banker and customer, on which the whole law of cheques really depends, nor is that important instrument considered in its fundamental aspect as a mandate to the banker.

Mr. Richardson pays much less attention to the cases than would a lawyer, and there is much to be said for this in a beginner's book, but surely to discuss cases without giving their facts, particularly such important cases as *London Joint Stock Bank* v. *McMillan,* is asking for trouble. Again, is it possible adequately to present the law on negligence under section 82 without any mention of the cases at all?

There are a number of matters on which the book is likely to be misleading. In the introduction to Part 2 it is suggested that the use of cheques has led to a decline in the use of other types of bill. This is no doubt true up to a point, but if the student is led thereby to suppose that commercial bills have ceased to be important much harm will have been done. Again, the explanation of 'antecedent debt or liability' under section 27 is quite unsatisfactory. For the purpose of terminating the banker's mandate lunacy is treated as the equivalent of death, and notice of presentation of a bankruptcy petition is equated with the making of a receiving order: these and other complicated matters are set out without any attempt at explanation.

On the other hand, Mr. Richardson's book contains some useful and novel features; *e.g.,* his diagrammatic use of the links of a chain to explain the course of negotiation. Much of his explanatory material is distinctly helpful and sometimes rather original. In collaboration with a competent lawyer he might well produce a volume which would be a distinct contribution to the needs of beginners in this difficult subject.

C.

Business Law. By Robert O. Sear and Benjamin W. Palmer. [New York: McGraw-Hill Book Company Inc. xiii and 478 pp. (with index). Price in England 16s. 6d.]

I have perused this book with much interest, because methods of presenting elementary law are more likely to differ from one country to another than are methods of presenting more advanced law, *e.g.,* for practitioners. This volume has a number of features which are seldom if ever found in similar English textbooks: most of these I consider distinctly useful: and since much of the law dealt with is common to both countries, an intelligent use of this book for auxiliary reading could hardly fail to be helpful to an English student of elementary commercial law.

The normal practice of our textbooks is to commence with the law of contract, which I have always felt was a bit far on for a green beginner whose conception of the meaning of law is often of the vaguest. In this book short chapters on the meaning of law, classification and procedure, as also a not very appropriate chapter on damages and specific performance, precede

the substantial section of the work which is devoted to contract. Then follow chapters on the various types of commercial contract and on trading associations of much the same type as would be found in an English elementary textbook. After which there are chapters on debtor-creditor relationship, real estate, mortgages and mechanics' liens, Government regulation of business, modern labour legislation, and torts and crimes. The elements of the law of industrial property, which is sometimes dealt with in similar English books, is not included.

The style of exposition is simple, almost homely, direct and clear. Illustrations from the cases is copious, and each chapter concludes with a series of test questions of a very practical character. Specimens of commercial documents are given, often photographic, and there are a few diagrams. A certain amount of background material is included, and an attempt is made, rather unevenly, to bring out the social implications of the rules stated. Altogether the authors give the impression that they are more closely in touch with the practical side of business than is the case with our own textbook authorities.

C.

The Bankruptcy Act of 1898 as Amended, with annotations by Professor John Hanna and Professor James Angell McLaughlin, Second edition published by The Foundation Press, Inc. 1947.

This is not a textbook. In their preface the learned editors describe it as a pamphlet. It consists nevertheless of some 395 pages of closely printed matter. In the main it sets out the American bankruptcy code as it stands at the moment as a result of the principal Act of 1898 having been, in the graphic phrase of the editors, 'the subject of considerable tinkering' in the course of no fewer than forty-two 'amendatory' Acts.

As the code is presented there are fifteen separate chapters, sub-divided into sections numbered up to 755. There are, however, many gaps in the continuity of this numbering, most of which remain unexplained; though in the case of the absent sections 78–80 it appears that in 1936 these were held unconstitutional in the case of *Ashton* v. *Cameron County Water Improvement District No.* 1, 298 U.S. 513, on the ground that to allow a political subdivision to compromise or repudiate its obligation constituted an unconstitutional encroachment by the federal government upon the fiscal powers of the State, to which the State could not consent without unconstitutionally surrendering its sovereignty. To supply the deficiency thus exposed, an Act was passed in 1937 designed to replace the lost sections in unobjectionable form. This was itself challenged in the courts not long afterwards, but was upheld, and subject to several subsequent amendments still stands part of the bankruptcy code.

The editorial annotations are designed chiefly to explain the development of the code, and to relate its several parts to one another. For the most part they set out for comparison enactments that have been replaced. Occasionally, however, they launch out into explanations that are of more than purely technical interest. One example is a note on p. 55, headed 'Official Receiver Banned as Monopolistic'. After citing an Act of 1934 limiting the powers of appointing receivers and trustees, and explaining that it was evoked to stop a certain existing monopolistic practice as to which 'there was a sharp difference of opinion whether efficient administration had been promoted' the editors add: 'The fact that the opponents of this practice mustered the votes to abolish it has not settled the merits of the controversy, but it has been interpreted as evidence that a proposal for official receivers in bankruptcy would meet strong resistance'. In another instance (on p. 106) a footnote to section 70f. points out that an amendment effected by the

important Chandler Act (1938) requiring an auctioneer employed by the court receiver or trustee to sell the bankrupt's property to be 'a bona fide resident and citizen of the judicial district in which the property to be sold is situated', was frankly added as representing 'political insistence on local patronage'. Here and there the learned editors have permitted themselves other comments and even an occasional suggestion for improvement, but generally speaking they have kept strictly to their scheme of explaining the technical developments resulting from the numerous amendments.

The last hundred pages or so of the volume are devoted to the setting out of fifty-six General Orders in Bankruptcy and sixty-nine Bankruptcy Forms without editorial comment.

The work is evidently designed to be used as an up-to-date appendix for reference in connection with a practitioner's textbook. The editors themselves refer to *Collier on Bankruptcy* (14th ed.), and to Remington, *Bankruptcy* (4th ed., 1936). Unless so used, however, it is difficult to understand how it is practicable to refer readily to the contents in the absence of an index. To the English practitioner such an omission would constitute a grave handicap to the efficient use of what would otherwise be a most valuable technical manual.

WALTER RAEBURN.

MOTOR CLAIMS CASES. By LEONARD BINGHAM, Solicitor of the Supreme Court. Supplement to the First Edition. [London: Butterworth and Co. (Publishers), Ltd. 1947. x and 67 pp. 5s. net.]

THE LAW OF COLLISIONS ON LAND. By A. D. GIBB, LL.B. Fifth edition. [London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. xl and 479 pp. £2 2s. net.]

THE TRIAL OF MOTOR CAR ACCIDENT CASES. By A. D. GIBB, LL.B., and R. MILLNER, M.A. Third edition. [London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 345 pp. £2 2s. net.]

THESE three works may properly be noticed together. Their basic subject-matter, the wastage of life and limb which occurs daily wherever motor vehicles may happen to find their way, is a problem which is still with us; a problem still prolific of profits for practitioners and of heart-searching for sociologists. The new scheme of national insurance may, of course, as time goes on, relegate the whole topic to limbo, but, while the range of benefits is so out of proportion to what a claimant may reasonably expect at the hands of the courts in an action in tort, it is unlikely that recourse to the courts will be unpopular.

Of the three productions, Mr. Bingham's is in a class by itself. The present reviewer had the pleasure of reviewing the main work in July, 1947 (Vol. 10, No. 3, p. 343), and it need hardly be said that the first supplement, produced with admirable expedition, maintains the high standard originally set. The inevitable batch of misprints are corrected and a number of decisions, previously considered to be of secondary importance, are now incorporated. The new material, of which there has been much since the first edition, is fully annotated-up to July, 1947. Readers will find particularly valuable the full text of the agreement setting up the motor insurers bureau for dealing with victims of uninsured drivers (pp. 59–64); the list of recent decisions indicating the range of figures awarded for various types of injuries (pp. 36–7); the amplification of the notes on the position of the Crown in tort cases (pp. 4–7, now superseded, as the author somewhat wistfully anticipated, by the Crown Proceedings Act, 1947); and the annotation of a variety of decisions on a topic which is still very much shrouded in obscurity, namely, the proper basis for dealing with costs when a plaintiff's claim is

docked under the Law Reform (Contributory Negligence) Act. And in following the author on these as on other topics the reader will be lost in amazement at the range of Mr. Bingham's researches and the exhaustiveness of his reading. Not merely the learned periodicals, but even the evening newspapers and provincial press are combed for material. More than ever is the book now an indispensable tool for any insurance officer or lawyer whose business or practice brings him into this specialised field in which, above all others, the law of negligence is in the making.

Gibb's *Law of Collisions on Land* made its first appearance in 1925 and has now reached its fifth edition. Before Mr. Bingham's book it was almost the only sizeable treatment of the topic and was and still is a useful work, particularly as a signpost to the Scottish cases which, south of the border, are so frequently overlooked. The general plan of the book consists of a series of rules or articles formulating the relevant legal conceptions, and these are followed by illustrations drawn from the cases and by general commentary. It is certainly helpful to have the subject divided up in some such way as this. The commentary on the whole is stimulating and well written, but the treatment of contributory negligence is open to criticism. Much undoubtedly remains to be said by the courts on the Contributory Negligence Act of 1945, but lack of precise decisions should not have debarred the author from attempting some exposition of what the Act has achieved. Merely to repeat the old law in all its bewildering confusion is less than helpful. It may be doubted too whether the inclusion of the *Highway Code*, complete with its picturesque little diagrams showing how a policeman on point duty is supposed to behave, etc., is really worth while, even though breach of its provisions can be relied on as prima facie evidence of negligence; but this is perhaps merely a matter of taste. The book may be recommended to advanced students as an exposition of the law of negligence as seen in one of its specialised branches; it is doubtful whether the practitioner will find it very much help now that he has got Bingham.

The little book on the *Trial of Motor Car Accident Cases* (and it is a little book in spite of its 345 pages because the print is often outsize and covers, as a rule, little more than half the page) rather baffles me. There must be very few people who have been in practice more than a week who need to have set out one by one the questions to ask the various witnesses in a running down case. But perhaps to the very young solicitor's clerk it is helpful to have explained why the 'old hand' asked the questions he did. There are some intriguing tit-bits; *e.g.*, 'If there is a claim for damages to clothing, such clothing may be shown in support of the allegation. Any idea, however, of exhibiting the clothes in such a condition as to play upon the feelings of the jury is to be deprecated'.

STEPHEN CHAPMAN.

PATENTS AND REGISTERED DESIGNS AND THEIR EXPLOITATION. By T. A. BLANCO WHITE. [London : Stevens & Sons, Ltd. 1947. ix and 74 pp. 4s.]

THIS small volume is published in the series 'This is the Law'. It is addressed to business men and to manufacturers in particular. It should prove very useful to them. In seventy-five pages of small size Mr. Blanco White gives a résumé of the essential features of patents, registered designs and artistic copyright insofar as the latter is of significance to the manufacturer. The way the author has managed to give in the small space available all the relevant information is remarkable. He deals, among others, with the following points: The different sorts of protection, patents and how to get them, how much use are patents, patenting important inventions, etc. The

two last questions are of particular importance to the manufacturer. The business man will usually leave the legal and technical problems of obtaining and fighting a patent to his patent agent and counsel. He does, however, want to—or ought to—form his own opinion on the importance of patent and design protection and the value received for money spent thereon. I do not know of any other book where the manufacturer can obtain this information in such a concise and readable form.

The difference between patents and registered designs is not clearly worked out in chapter 1. A patent protects technical (functional) features of an article or process; a design protects features appealing to the eye, such as shape or colour. The statement on page 13 that 'almost anything will do as a provisional specification' is misleading; it is essential that the provisional specification should contain a definite statement on the gist, the pith and marrow, of the invention; details can be worked out later. In order to protect in this country inventions made abroad the author advises 'separate applications', *i.e.*, applications not based on the foreign priority under the International Convention; this advice may be correct in some, but certainly not 'in almost any case' (p. 35). I agree with Mr. Blanco White that for really important inventions the responsibility for wording the claims should be placed on counsel (p. 38), but what really matters is team work between the inventor, the manufacturer, the patent agent and counsel. Declaratory actions giving a manufacturer an assurance that a new product he wants to make does not infringe any existing patent are suggested by the Patent Law Reform Committee, but these are not present law, as stated on p. 43. Since space puts a limit on citing decisions it would be preferable to omit several of the less important design cases and include a few more leading patent cases. On page 65 the name of the Royal Commission on Awards to Inventors should be given.

Mr. Blanco White explains that 'the value of a patent depends greatly on its not being too important', because in the latter case it is worth while for the would-be infringer to spend a lot of money and trouble to prove its invalidity. This may sound paradoxical, but unfortunately under the present British patent law and practice it is true. The advice given by Mr. Blanco White to a manufacturer who desires to protect an important invention is correct and most valuable. If it does not go far enough, this is not the fault of the author but of the law.

Peter Meinhardt.

The Law of Meetings. By Sebag Shaw, and H. A. R. J. Wilson. [London: Macdonald & Evans. xxviii and 276 pp. (with index). 15s. net.]

Life is one long series of meetings, and there is no obvious sign of any change for the better—rather the reverse. It is strange, therefore, that there should be such a lack of good textbooks on the law relating to meetings. This lacuna has been filled, and filled very adequately, by the work under review, which 'meets a long-felt want'. It can be warmly commended.

The so-called rights of meeting and free discussion are among the fundamental civil liberties upon which our free system of democratic government has been built up. They have been thoroughly discussed by the constitutional lawyers, and notably by Dicey. An adequate statement of the law relating to these matters is the obvious groundwork for a work on the law of meetings, the treatment here is excellent, the principles of the matter being set out succinctly, lucidly, and objectively in Part 1 (40 pp.).

In Part 2 what may be called the mechanics of the matter is dealt with fully. The regulation of meetings, which is largely a matter of the chairman's conventional powers, the constitution and conduct of meetings, the ordering

of discussion and debate, and all the practical problems and difficulties which may arise in connection with voting are discussed, and the rules or conventions clearly set out. I am not acquainted with any other work, except some of the large specialist works on company law, which handles these intricate and exceedingly important matters with any approach to the mastery of the authors of this volume.

There is material here for a profound study in the jurisprudence of law making, for here is a mass of reasonably well co-ordinated law which has grown up for the purpose of enabling business of great importance to be conducted in a practical, sensible way and without unduly protracted discussion. Some of it has been passed upon, and knocked into shape by the courts, but by and large it is the achievement of the common man, and compares well with the procedure evolved over a much longer period by highly competent professional lawyers for the regulation of trials at law. It may without hyperbole be acclaimed as one of the outstanding achievements of the ordinary Englishman. Not that it has not throughout been under the strong influence of lawyers, for no one could fail to perceive how great has been the effect of Parliamentary procedure on all other kinds of meeting, and from the beginning procedure at Westminster has been largely developed from the experience of lawyers already adept at achieving results by the method of dialectic.

Part 3, which is much the most substantial section of the book, deals with the business of company meetings. This ground, as I have already said, has been adequately covered in the standard textbooks on company law, but it is well and not too technically handled here.

Part 4 is mainly concerned with meetings of local authorities, and again covers ground which has been well tilled. Part 5 deals principally with meetings of statutory companies and with meetings in bankruptcy.

C.

The Justices' Handbook. By J. P. Eddy, K.C. [London: Stevens & Sons, Ltd. 1947. xi and 148 pp. (with index). 7s. 6d. net.]

The need for providing Justices of the Peace with literary guidance in their work has been realised from a very early date, and has been the occasion for the writing of many famous books: was it not a consideration with Blackstone when he decided to write the *Commentaries?* Slim volumes expand with successive editions until they become incomprehensible to the ordinary magistrate, and like Stone's *Justices' Manual* are elevated to the libraries of the profession, and become part of the essential equipment of every justices' clerk.

It becomes necessary in every generation, therefore, to provide something new, something more elementary and intelligible, something more clearly directed to the sort of work upon which the justices are engaged, which naturally alters with changing social conditions. Despite a number of admirable books of a rather general character of which those by Mr. Claud Mullins and Sir Leo Page are best known, our own time is curiously lacking in the more practical and technical kind of guide, and most magistrates will, I am sure, welcome Mr. Eddy's attempt to fill the gap.

To provide all that is needed in very little more than a hundred pages is impossible, and yet if the author once begins to depart from that objective of conciseness which he has set before him he will be on a slippery slope indeed. Mr. Eddy—than whom there are few men practising at the bar with a wider general experience of the sort of cases which come before magistrates' courts—has had his eye on the essentials all the time, and yet he takes a broad and commonsense view of what is needful information for magistrates, as, for example, when he quotes the experience of the records of pupils at Home Office Approved Schools as showing 'that the great majority do well and give no ground for further anxiety'.

After a short chapter on fundamental principles Mr. Eddy defines and

explains shortly the more important or common crimes, outlines the procedure both before court and in court, provides an all too short outline of the rules of evidence, deals with bail, poor prisoners, and probation and punishment, and provides chapters on juvenile courts, domestic proceedings, affiliation, liquor licensing, and appeals. He also has a very short chapter on the non-judicial work of justices.

Punishment is in a sense the most important of the duties of justices and the one in which they are the most thrown back on their own resources. Moreover many of them are woefully ignorant of the whole subject. Mr. Eddy gives quite a substantial proportion of his short book to the subject, and I am sure that he is right. Many magistrates will use his book and it is a pity that he does not refer them to the work of Dr. Mannheim, Mr. Mullins, Sir Leo Page, the publications of the Howard League, and other sources of information upon this vital subject.

One could naturally make all sorts of suggestions in connection with such a volume, and if they were adopted the work might well cease to serve its purpose. Further editions will undoubtedly be called for and the work will be moulded and remoulded in the light of the author's experience as to what is required. I will confine myself to a very few matters.

It is of course true that *mens rea* is essential to crime at common law, and right to emphasise the fundamental importance of this. Magistrates, however, deal with so many cases of statutory offences in which there is no question of *mens rea* that this side of the matter should have been clearly pointed out.

When dealing with the evidence of accomplices Mr. Eddy seems to have forgotten that he is speaking primarily to assist magistrates in petty sessional courts, for he discusses the matter on the basis of how it should be left to the jury. Magistrates must obviously from time to time have the evidence of accomplices before them and a clear discussion as to how far corroboration is required would be valuable to them. What is or is not corroboration may, of course, be an exceedingly difficult problem, but no attempt is made to enlighten the reader on the matter, except in a different part of the book where the discussion is limited to affiliation cases.

Another point dealt with under 'Evidence' is 'Opinion', where it is stated *tout court* that the opinion of a witness is inadmissible except when expert. In one of the commonest types of case which come before magistrates, the motoring offence, the question of the speed at which a vehicle was travelling is in issue, and yet this is almost always a matter of opinion upon which witnesses very properly give their evidence.

C.

Lincoln's Inn; Its History and Traditions. By Sir William Ball, o.b.e., King's Remembrancer. [London: Stevens & Sons, Ltd. 1947. viii and 285 pp. 10s. 6d. net.]

This little volume is not entirely devoted to an account of Lincoln's Inn for, as the author says, he is also endeavouring to give those about to enter the legal profession some notion of life in the Law and he draws on incidents in his own career. Some sixty pages of legal anecdotes, retailed in the tradition of those numerous volumes of memoirs bearing such titles as 'Recollections of Bench and Bar' and 'Fifty Years of Law and Life', undoubtedly help to an understanding of the *genius loci*. The lore of the Inn is presented lightly but instructively. The sad tale of the passing of the former Barristers' Common Room is touched on but not elaborated. A fuller account of the contents of the library would have been welcome, as would some attempt at an architectural appreciation of the Inn. The statement at page 53 that admissions *ad eundem* are frequent today as many a member of the Bar finds it convenient to belong to more than one Inn is surprising. The author has

done well to avoid hackneyed photographs; instead we have several interesting reproductions of pages from the *Black Book* and the *Admission Book* and, for frontispiece, an agreeable sketch of the 'Gatehouse'. The publishers are to be congratulated on the appearance of this book which is of an elegance foreign to the volumes usually found in the hands of members of the Chancery Bar.

W. H. D. WINDER.

ANNUAL SURVEY OF AMERICAN LAW. 4 vols., covering the years 1942 to 1945 inclusive. [New York: New York University School of Law. 1945–6. lxiii and 994, lvii and 962, lxxxi and 1252, and lxxxiv and 1375 pp. respectively. $5 net each.]

THE appearance of this American counterpart of the *Annual Survey of English Law* will be welcomed by all serious students of the law. It is an invaluable guide to current American law, as well as to international law from the American point of view, and will be particularly appreciated in this country by the teacher of law, the research worker and the text-book writer. There was a time, a generation ago, when American decisions were adequately considered in some of our leading practitioners' books. Beven, Benjamin and Marsden made a serious effort to note the main divergencies between the American and English authorities; but their editors have not followed them in the task. In the recent editions of these works the authors' references to American cases have been either left static or (a piece of vandalism) wholly excised. Except in the case of the more academic text-books the practice of noting transatlantic decisions has lapsed, probably because of the vast proliferation of reports and periodicals in the United States, which makes their system too cumbrous for an outsider to handle. The publication of the American Law Institute's *Restatement* did much to restore the common law of the United States to comprehensibility, and the present work supplies an effective means of keeping up to date the picture presented in the *Restatement*. The work is also of great importance for those who wish to keep abreast of developments in American public law.

A few comparisons between the American and the English *Survey* may be of interest. The work under review is considerably more ambitious than its English prototype—necessarily so, for the volume of material to be considered is many times larger. Thus the 1945 American *Survey* is four times as big as the average volume of the English work. But apart from the necessity of the case the work is planned on a more comprehensive scale than the *Annual Survey of English Law*. A few topics are dealt with that find no place in the English *Survey*, such as taxation and legal education. Also, the proportion allotted to public law is much larger. In the 1940 English *Survey* (the latest available) public law and industrial law occupied only 54 pages out of 295, or just over one-sixth of the whole. In the 1945 American *Survey* these subjects take 623 pages out of 1375, or nearly one-half. It is somewhat paradoxical that although English public law is in some respects more advanced than the American, English lawyers are slower to recognise its importance.

The treatment of legal history is somewhat cautious. The 1942 volume contains no section on legal history. Such a section starts in 1943, but it is confined to specifically 'American' legal history; contributions to English legal history are noted 'only when they are of special interest to American lawyers or have a direct bearing on American law'. In other respects, however, the chapter on legal history is rather an omnibus one, for it includes constitutional history, the history of international law and institutions, the history of criminology, and even the history of jurisprudential thought. It would perhaps have been better if some of these specialised matters had been dealt with under the headings to which they refer.

There is always a difficulty in a composite work of this kind in achieving a full integration of the different contributions. It would be easy to point out certain minor defects in this respect. Thus cases are discussed separately and somewhat differently by different contributors without cross-references (*e.g.*, 1943 volume, pp. 487–9, 586–7), and a law-review criticism of a case is recorded at one place but not at another (*ibid.*, pp. 79–80, 697–80, 829–31). In the 1945 volume we are told at p. 696 that the distinction between leases and other contracts in the law of frustration is disappearing; but at p. 944 the trend is stated to be towards the English view that the doctrine of frustration is inapplicable to leases. A discussion of United States jurisdiction outside the three-mile limit in respect of fishery conservation, and of jurisdiction over the continental shelf, is found under the unlikely heading of Transportation Law (1945 volume, p. 855 ff.), and is not cross-referenced from International Law. Slips like this must occur under any editorship, particularly where it is important to publish on time; and they are largely corrected by a good index.

The *Annual Survey of American Law* is a 'must' work for any self-respecting law library. We hope that it will become a permanent institution.

G. L. W.

Cases and Materials on Civil Procedure. By Paul R. Hays, Professor of Law, Columbia University. [The Foundation Press Inc., Brooklyn. 1947. xiii and 1067 pp. Price $8.]

This volume forms part of the well-known University Book Series, which in the United States is so popular a tool for teaching and learning the law and of which the volume devoted to the conflict of laws is probably the most familiar to English lawyers. The book reproduces numerous judgments delivered by American courts of all jurisdictions, the text of statutory provisions and extracts from many papers published in periodicals. No doubt this work admirably serves the purpose which it is intended to fulfil, but the author will not be disappointed to hear that he cannot expect to find many readers here. Civil procedure is one of those branches of the law the systematic and academic treatment of which does not attract many English lawyers. This does not mean to say that some knowledge of American procedure would not be useful or that the jurisdictions of the United States have not developed features (such as the substitution of 'briefs' for a great deal of oral argument or the 'rehearing' of a case) that are not worthy of study, particularly in connection with the reform of civil procedure which is at present under consideration. This book, however, teaches technique rather than broad policy or general ideas, and it is for this reason that, however valuable it must be for the American student, it will interest only few lawyers in this country.

F. A. Mann.

The Law of Trusts. By George W. Keeton, m.a., ll.d., of Gray's Inn, Barrister-at-Law, Professor of English Law in the University of London, Dean of the Faculty of Law, University College, London. [London : Sir Isaac Pitman & Sons, Ltd. 1947. lv and 459 pp. 25s. net.]

The author does not preface the fourth edition, as he did the third edition, of this well-known work with a note on the scope of the new edition. There has, in fact, been no extensive re-writing or overhauling of the previous edition but summaries of the effect of a number of cases decided since 1939 have been inserted in the text. Among notable decisions which do not find a place either in the text or footnotes are: *Naas* (*Lady*) v. *Westminster Bank*,

Ltd. ([1940] A.C. 366), *Knightsbridge Estates Trust, Ltd.* v. *Byrne* ([1940] A.C. 613), and *Re Compton* ([1945] Ch. 123). There is a mistake in the reference given in the table of cases for *Re Royce* ([1940] Ch. 514), but the text supplies the right citation. The account given on page 156 of the exemption, under the provisions of section 117 of the Education Act, 1921, of educational charities from the necessity of complying with the terms of the Mortmain and Charitable Uses Act, 1888, needs to be re-written in the light of the changes introduced by section 87 of the Education Act, 1944, which repealed the earlier Act, including section 117. A good book deserves good editing and there is a danger that Professor Keeton may derogate from his own grant of the best of the shorter works on the law of trusts.

W. H. D. Winder.

Law of Employment. By E. Sachs, K.C. [London : Pitman & Sons, Ltd. 1947. ix and 69 pp. 6s.]

This little book comprises the four Gresham lectures delivered by its author in the autumn of 1946. Its purpose, we are told in the foreword, was to summarise for the benefit of employers and employees their respective positions under contracts of employment; and that purpose is amply fulfilled. The narrative flows easily over the contractual field in an hour's reading, stating the main outlines and touching upon the further vista of tortious and statutory duties.

Probably the book's greatest merit is that, as far as it goes, the legal rules are woven naturally into the texture of everyday employment relationships. In lectures on law, this practical touch must always be particularly welcome as a reminder that the law derives its being and vitality not from innumerable forms but by way of answer to the demands of the times.

At the end of the book Mr. K. E. Shelley, K.C., adds a miniature on the law of Patents and Copyright.

C. G.

Statute Law Relating to Employment. By F. N. Ball, LL.B. [London : Stevens & Sons, Ltd. 1946. xii and 278 pp. 25s.]

The second edition of Mr. Ball's work has had the enterprise to break away from the plan of its predecessor, laying its emphasis upon the new legislative measures which, with certain superadded reforms, have sought to bring up to date the law concerning industrial insurance and industrial relations.

Of course, despite its title, the book does not deal with all statute law relating to employment. Trade union law and the law regulating mines are notable omissions that spring immediately to mind. On the other hand, what is dealt with are the Truck Acts and the Acts concerning Workmen's Compensation, Factories, Reinstatement in Civil Employment, Wages Councils, Disabled Persons, the Ministry of National Insurance, Family Allowances, Industrial Injuries, and National Insurance.

Each statute is subjected to a rational rearrangement and simplification of its detailed provisions; and a commentary follows on the essential stuff. In other words, certain trees are, as it were, cut away to enable us to see the wood, a manner of treatment that is carried out, as a whole, with skill and accuracy.

Hence, though the book is not, indeed, does not pretend to be, a work of legal scholarship, it does afford a clear and rapid survey of the basic material contained in the statutes mentioned. For the layman, like works manager or trade union official, whose profession brings him into daily contact with industrial law, this work is undoubtedly useful; and it might also be

recommended to university students, especially external students cut off from oral guidance, as a book of preliminary reading to help break that hard top-soil found by the novitiate on all academic subjects.

A footnote on minutiae may be subpended. The introductory sentences on topics like negligence, contributory negligence, *volenti non fit injuria*, might with advantage have been supplemented by a reference to a standard work; and so too might the mention of contractual frustration (at 30) and *novus actus interveniens* (at 40). The expression of footnote 1 (at 14) is elliptical to the point of error; and, finally, footnote 5 (at 203) should, since it refers to chapters 20 to 24 inclusive, be transposed from the commencement of chapter 21 to that of chapter 20.

C. G.

THE FINANCE ACT, 1947. By H. E. AMOS, Barrister-at-Law, and F. ENGLAND, B.A., LL.B., Solicitor and formerly a Special Commissioner of Income Tax. [London: Butterworth & Co. (Publishers), Ltd. 1947. 160 and (index) 14 pp. 15s. net.]

THE Finance Act, 1947, was of more than ordinary importance in the realm of taxation for, in addition to a considerable recasting of the law relating to the Profits Tax, it witnessed the introduction of a new type of stamp duty, that levied on the bonus issue of securities, and also of a special code aimed at legal evasion of income tax by means of schemes for retirement and other benefits for directors and employees.

The above work has been reprinted as a separate volume from Butterworth's *Annotated Legislation Service*. The method adopted is a section by section annotation of the Act which takes into consideration both the future and the old law on each topic. A valuable feature of these annotations is the insertion of verbatim extracts from *Hansard* giving the official explanations by the Chancellor of the Exchequer, and other ministers, of the effect, or reason, of the various sections; though these statements have, of course, no binding effect in law, they may be taken as setting forth what will probably be the departmental practice on the application of the relevant section. The explanation by the Solicitor-General of the effect of the new law relating to retirement benefits (pp. 44–5) is particularly valuable, as is the verbatim reproduction of notes issued by the Board of Inland Revenue on the duty of companies who become liable to the new stamp duty on the bonus issue of shares (pp. 112–115).

This comprehensive work can be specially recommended to the junior branch of the legal profession, for no solicitor will find his work unaffected by the provisions of the 1947 Act which, in addition to the particular matters detailed above, also materially altered the general law relating both to stamp and to death duties.

A. FARNSWORTH.

INCOME TAX. By C. N. BEATTIE, LL.B., Barrister-at-Law. [London: Stevens. 1947. vi and 116 pp. 4s. net.]

THIS work is one of the *This is the Law* series, where the aim is to present to the layman the law on various subjects in a readable and concise form. Mr. Beattie succeeds admirably in his effort to condense into readable and intelligible form one of the most complicated branches of our legal system. After a 'General Explanation', which brings out very clearly the effect of the principle of 'Taxation at Source', he covers the field of Schedules A, B, D and E, Allowances, Returns, and certain subsidiary matters such as the liability of the Armed Forces and Husband and Wife. Considering the book is

written primarily for the layman, the chapter on 'Deeds of Covenant' seems somewhat out of place, for no one would venture on these without professional advice.

This little work can be recommended to any layman who desires to know the 'why and wherefore' of his liability and whether to take further advice; it is also an excellent introduction to the subject for the student before he embarks upon the more detailed and thorough *Rowland*. There are one or two slips of a minor nature in the work which will doubtless be corrected in the inevitable second edition.

A. F.

Building Contracts. By Alfred A. Hudson. Seventh edition by Lawrence Mead, b.a. [London: Sweet & Maxwell, Ltd. 1946. lxxxiii and 624 pp. £3 15s.]

This new edition of a well-known textbook follows the lines of the preceding edition without any major alterations. It has, however, been generally revised and brought up to date and should continue to prove invaluable particularly to architects, surveyors, engineers and building contractors, and to their legal advisers who will here find collected a mass of information not otherwise readily available.

L. C. B. G.

Law Relating to Hospitals and Kindred Institutions (incorporating 'Law for Nurses'). By S. R. Speller. [London: H. K. Lewis & Co., Ltd. 1947. xxxv and 399 pp. 22s. 6d.]

Mr. Speller has filled a gap in legal literature by producing a comprehensive textbook on the law as it affects hospitals, nursing homes, etc., a task for which, as Secretary and Director of Education of the Institute of Hospital Administrators, he is particularly well qualified.

To write this book would not have been easy at any time because it involves dealing with a somewhat heterogeneous variety of branches of the law in one book; it must have been even more difficult now owing to the transition to the National Health Service and the consequent transfer of the hospitals to the State. The learned author has, however, coped successfully with both difficulties. Perhaps no two people will agree on the selection of the subject-matter, or rather subject-matters, of a book of this nature, but the present reviewer agrees with both the author's selection and his general arrangement. It was undoubtedly sound to discuss the 'pre-nationalisation' law (such as the rules governing charities as affecting voluntary hospitals) in detail, not only because some hospitals will not be nationalised, but also because it cannot be safely disregarded until the effect of the National Health Service Act, 1946, has been demonstrated in practice, and last not least because hospital administrators should be able to understand the history of the institutions they are in charge of. On the other hand, it was equally right to exclude a detailed treatment of the law relating to mental deficiency which would have swelled the book to unmanageable proportions.

Of individual topics the chapter on the liability of hospital authorities for the acts and omissions of doctors, nurses, etc., may be mentioned, and also the author's warning against the practice of artificial insemination. This is based on what must be the record number of legal uncertainties and pitfalls which attach to it in addition to the moral objections to which, in the reviewer's opinion, it is open. The provisions of the National Health Service Act are

made clear by means of a very useful diagram and the index appears to be adequate.

In conclusion, a few suggestions may be made for the second edition which will certainly be called for. The Table of Statutes would be more useful if references to the regnal year and chapter were added, and a list should be given of the Statutory Instruments that will by then have been made under the National Health Service Act, at least of those not of purely ephemeral character. The bibliography, it is suggested, might be improved in two ways: in the first place by making it more complete (at present it is too selective, *e.g., Anson* and *Sutton and Shannon* are listed on contracts but *Cheshire and Fifoot* and *Salmond and Williams* omitted), and secondly by providing fuller bibliographical information (the edition and year of publication as well as the number of pages should be given in addition to the name of the publisher). Finally, in the reference to *Lough* v. *Ward* on p. 68 the volume number of the report is missing, and on page 79, line 22 'presnet' is printed for 'present'. These suggestions, however, do not go to the root of the matter and are not meant to detract in any way from the merits of Mr. Speller's work.

W. A. Steiner.

Poetic Justice. By J. P. C., illustrated by Leslie Starke. [London: Stevens & Sons, Ltd. 1947. 84 pp. 6s.]

To mix legal lyric with flavour satiric, and produce a digestible dish, is to ask that a poet both learn law and know it—a very extravagant wish. Shakespeare, it is true, was one of the few who made plaintiff a Semite sectarian, and managed in verse to save from the hearse the Venetian defendant, an Aryan. No doubt the Bard's mind was not quite refined or he wouldn't have spoken, when dead, and legally left to his wife, then bereft, the joy of his second-best bed.

Procure then this book if you tend to look on the law as a thing metaphysical, and you will rejoice to see in your choice an outlook refreshingly quizzical. The anonymous writer could have been lighter (though I don't want to be a curmudgeon); but I'd like to have seen the cutting more keen—the rapier's thrust, not the bludgeon. The windmills of law, filled with hot air and straw are targets for quixotic missions, and we hope J. P. C., Sancho Starke at his knee, will charge into further editions.

J. A. G. Griffith.

Town and Country Planning Law. By James Kekwick, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1947. xvii and 556 pp. £2 5s.]

This book consists of the Town and Country Planning Act, 1947, copiously annotated, with appendices containing the Acquisition of Land Acts, 1919 and 1946; the Requisitioned Land and War Works Act, 1945, Parts 2, 8 and 10; the New Towns Act, 1946; and the Statutory Orders (Special Procedure) Act, 1945. To have produced it so soon after the passing of the Act is a *tour de force* on the part of both author and publisher. But when that has been said, it must be asked whether it may not to some extent represent misguided industry. The Act is a skeleton still requiring to be covered with the flesh and blood of the promised regulations. Until these are published the practitioner can do little more than familiarise himself with its anatomy and his immediate need is for a simple guide to its general principles—such as that provided by Mr. Heap's pamphlet referred to below—with practical advice on any action necessary in connection with current transactions.

Instead of being content to provide such a guide, Mr. Kekwick has clothed the skeleton with an elaborate commentary and his publishers have dressed it in handsome and costly raiment. But in the absence of the regulations a detailed commentary on the Act is of limited and only temporary value and something altogether less pretentious and expensive would have been equally acceptable at present. True, it is proposed to bring the book up to date by supplements as the regulations are published, but a collection of pamphlets does not make a satisfactory textbook, and if Mr. Kekewick is to write the last word on the new Town Planning Law, as well as the first, he will need largely to rewrite the present commentary, excellent though much of it is. In rewriting it greater emphasis might perhaps be paid to the conveyancing aspects since, as is rightly emphasised in the preface, the new Act finally removes the barriers between the public law of town planning and the private law of real property.

In the meantime this book will be useful mainly as a convenient collection of the various statutes and for the cross-referencing of their sections. Practitioners to whom money is no object will find it a welcome addition to their libraries; the rest of us will, for the time being, make do with the King's Printer copies and some more modest commentary.

L. C. B. G.

INTRODUCING THE TOWN AND COUNTRY PLANNING ACT, 1947. By DESMOND HEAP, LL.M., L.M.T.P.I., Comptroller and Solicitor to the Corporation of the City of London. [The Law Society. 1947. iv and 46 pp.]

THIS pamphlet, published by the Law Society for circulation to its members, is cordially to be welcomed both for itself and as representing a new departure by the Society. Written by an acknowledged authority, it admirably meets our need for a simple guide to the Act to enable us to grasp its general principles while awaiting the publication of the detailed regulations. It is to be hoped that the Society will commission more such pamphlets to assist us to find our way through new legislature; other suitable subjects might be the Crown Proceedings Act, the Agriculture Act and the National Insurance Acts.

OYEZ PRACTICE NOTES.

No. 3 : Adoption of Children. [1947. 60 pp.]
No. 4 : Execution of a Judgment. By J. F. JOSLING, Solicitor. (1947. 61 pp.)
No. 6 : Company Law and Practice. By MAURICE SHARE, B.A., Barrister-at-Law, assisted by CYRIL MONT, F.L.A. (1948. 99 pp.)
[The Solicitors' Law Stationery Society. 3s. 6d. each.]

THESE are useful additions to this excellent series. That on *Adoption* is likely to be particularly useful especially for its appendices containing the forms and a list of the names and addresses of the various adoption societies. That on *Execution* is also a handy guide to a subject the present intricacies of which reflect little credit on our legal system. The last volume on *Company Law* is little more than a summary of the Companies Act, 1947, with references to the relevant sections of the 1929 Act and the Cohen Report, and it is not likely to be much sought after now that the consolidating Bill is in print.

THE COMPANIES ACT, 1947. By S. W. MAGNUS, B.A., Barrister-at-Law, and MAURICE ESTRIN, A.I.A.A. [London : Butterworth & Co. 1947. 450 pp. 21s.]

THIS useful book is very good value. Subscribers to Butterworth's Annotated Legislation Service will obtain it automatically, but company lawyers who are not subscribers are recommended to purchase it at the most reasonable price. It consists of a brief introduction, a careful and detailed commentary on the Act written by a lawyer and an accountant, and appendices of forms, etc. Both the authors and the publishers are to be congratulated upon a good job, and Mr. Estrin's assistance on the accountancy aspects is likely to be found particularly useful by lawyers.

CHANGES IN COMPANY LAW. By MICHAEL WHEELER and GEOFFREY TRIBE, Barristers-at-Law. Current Law Guide No. 3. [London : Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1947. 92 pp. 6s. 6d. net.]

THIS excellent booklet summarises the changes in company law effected by the Companies Act, 1947, and the provisions of the Finance Act, 1947, dealing with the new bonus tax and retirement and other benefits to directors. It was a happy thought to combine the two Acts, and the commentaries by well-known specialists are likely to be found most useful by practitioners, who will wish that space could have been found for guidance from Mr. Tribe through the even darker paths of the profits tax.

THE RENT ACTS. By R. E. MEGARRY, M.A., LL.B., Barrister-at-Law. Third Edition. [London: Stevens & Sons, Ltd. 1947. xxxii and 213 and 8 pp. (index). 15s.]

No practitioner who has anything to do with the Rent Acts (and nowadays there can hardly be any lucky enough to escape) can afford to be without this, unquestionably the best, book on the subject. Since its first publication I have been one of the many who have used it constantly and have never failed either to find the answer or to satisfy myself that there was none. It is well arranged, delightfully written, most exhaustive—containing references to nearly 600 English, Scottish and Irish cases reported in law reports and the *Estates Gazette*—and it makes the subject as clear as it can be made, which, alas, is still far from pellucid since this legislation is a disgrace to our statute book.

Formerly the book was in two volumes, the first devoted to the text and the second to a reprint of the statutes, but in the third edition the two are in a single volume. The author states that this is in response to numerous requests but against his own inclinations; in my view his judgment for once was at fault and I consider the change a great improvement which removes the one irritating feature of the former editions.

The value of this book is sufficiently shown by the fact that the second edition went out of print in six months; by the time this review appears a fourth will probably be in preparation.

L. C. B. GOWER.